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~~1407~~ 1401

United States Circuit Court of Appeals

For the Ninth Circuit.

CHARLES H. PRAY,

Appellant,

vs.

W. B. COPES and J. E. HILL, Doing Business Under the Fictitious Firm Name of TRIANGLE IRON WORKS, and M. J. FITZGERALD and W. A. SAMSON, Doing Business Under the Fictitious Firm Name of NATIONAL FIRE ESCAPE LADDER COMPANY,

Appellees.

Transcript of Record.

Upon Appeal from the United States District Court for the Southern District of California, Southern Division.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

No. 4285

United States

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INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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Index.

NAMES AND ADDRESSES OF ATTORNEYS OF RECORD.

For Appellant:

RAYMOND IVES BLAKESLEE and J. CALVIN BROWN, 727–30 California Building, Los Angeles, California.

For Appellee:

GEORGE E. HARPHAM, Bryne Building, Los Angeles, California,

DOUGLAS L. EDMONDS, Stock Exchange Building, Los Angeles, California.

In the United States District Court, Southern District of California, Southern Division.

IN EQUITY—No. F.–89.

CHARLES HENRY PRAY,

Complainant,

vs.

W. B. COPES et al.,

Defendants.

ALIAS CITATION.

United States of America,
Ninth Judicial Circuit,—ss.

To W. C. Copes and J. E. Hill, Doing Business Under the Fictitious Firm Name of Triangle Iron Works, and M. J. Fitzgerald and W. A. Samson Doing Business Under the Fictitious Firm name of National Fire Escape Ladder Company, GREETING:

You and each of you are hereby cited and admonished to be and appear at a session of the United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the city of San Francisco, State of California, in said Circuit, on the 20th day of October, 1923, pursuant to an order allowing an appeal filed and entered in the clerk's office of the District Court of the United States for the Southern District of California, Southern Division, Ninth Judicial Circuit, in that certain suit in equity No. F–89, wherein you and each of you are defendants and appellees, and Charles H. Pray is complainant and appellant, to show cause, if any there be, why the order or decree entered in this cause in said District Court on the 23d day of July, 1923, against appellant, and mentioned in said appeal, should not be corrected, and speedy justice should not be done to the parties in that behalf.

WITNESS the Hon. WILLIAM P. JAMES, United States District Judge for the Southern District of California, Ninth Judicial Circuit, this 25 day of September, 1923.

WM. P. JAMES,
U. S. District Judge, S. D. C. S. D.

In the United States District Court, Southern District of California, Southern Division.

IN EQUITY—No. F.-89.

CHARLES HENRY PRAY,

Plaintiff,

vs.

W. B. COPES et al.,

Defendants.

State of California,
County of Los Angeles,—ss.

AFFIDAVIT OF J. CALVIN BROWN.

J. Calvin Brown being first duly sworn according to law, says: That he is a member of the law firm of Blakeslee & Brown, and one of the solicitors and counsel for plaintiff above named; that on September 26th, 1923, he called at the office of George E. Harpham, Esq., solicitor for defendants Samson and Fitzgerald in the above-entitled cause, in the Bryne Building, Los Angeles, California, and there left on the desk of said Harpham, at the direction of a person known by affiant to be in charge of said office, a true and correct copy of the original *alias* citation attached hereto; that afterwards affiant went to the office of Douglas L. Edmonds, attorney for defendants Copes and Hill, Stock Exchange Building, Los Angeles, California, and served upon said Edmunds a true and correct copy of the *alias* citation, at the same time exhibiting to him the original *alias* citation. Further deponent saith not.

J. CALVIN BROWN.

Subscribed and sworn to before me this 26th day of September, 1923.

[Seal] ADELINE M. MULLER,
Notary Public in and for the County of Los Angeles, State of California.

[Endorsed]: In Equity—No. F.–89. In the United States District Court, Southern District of California, Southern Division. Charles H. Pray, Plaintiff, vs. W. B. Copes et al., Defendants. Alias Citation. Filed Sept. 26, 1923. Chas. N. Williams, Clerk. By L. J. Cordes, Deputy.

In the District Court of the United States in and for the Southern District of California, Southern Division.

F.–89—EQUITY.

CHARLES HENRY PRAY,
Complainant,

vs.

W. B. COPES and J. E. HILL, Doing Business Under the Fictitious Firm Name of TRIANGLE IRON WORKS, *TRIANGLE IRON WORKS*, JOHN DOE and RICHARD DOE, Doing Business Under the Fictitions Firm Name of NATIONAL FIRE ESCAPE LADDER COMPANY, BYRON JACKSON IRON WORKS, a Corporation, SAM HILL, JAMES DOE and MARY ROE,
Defendants.

BILL IN EQUITY FOR ACCOUNTING AND INJUNCTION.

Charles Henry Pray, a citizen of the United States, and of the State of California, complainant, brings this, his bill of complaint against all of the above-named defendants, residents of the Southern District of California, Southern Division, and thereupon your complainant complains and says:

I.

That the defendant, Byron Jackson Iron Works now is, and, at all times herein mentioned, was, a corporation duly incorporated, organized and existing under and by virtue of the laws of the State of California; and that the defendants, W. B. Copes and J. E. Hill now are, and, at all times herein mentioned, have been doing business under the fictitious firm name of Triangle Iron Works; and that the defendants John Doe and Richard Roe now are, and, at all times herein mentioned have been doing business under the fictitious firm name of National Fire Escape Ladder Company.

II.

That heretofore, to wit, on the 15th day of June, 1920, complainant was the original and first inventor of a [1*] certain new and useful invention entitled, "Fire Escapes," a more particular description of which will be found in the letters patent hereinafter referred to and to which special

*Page-number appearing at foot of page of original certified Transcript of Record.

reference is hereby made, and in which letters patent are contained the following claims, to wit:

1. A fire escape comprising two relatively spaced stationary platforms and an intermediate stationary vertical ladder, a slidable ground ladder, means for retaining said ground ladder, in close sliding engagement with the stationary ladder, counterbalance means connected to the ground ladder, and manually operated means normally supporting the ground ladder in elevated position.

2. A fire escape comprising two relatively spaced platforms and an intermediate stationary vertical ladder, vertical guide rods intermediate of and secured to the platforms, a counterbalance weight slidable on said rods, a ground ladder, means retaining the ground ladder in close sliding contact with the stationary ladder, cable sheaves journaled on the upper platform, cables secured to the weight and to the ground ladder and passing over the sheaves, and means carried by the lower platform for normally supporting the ground ladder in elevated position and movable to release said ladder.

3. A fire escape comprising an upper and a lower platform having relatively alined open hatchways, the lower platform having opposed vertical grooves, a vertical stationary ladder secured at opposite ends to the upper and lower platform respectively, a vertically movable ground ladder slidable in said grooves, means for guiding the upper end of the ground ladder relative to the stationary ladder, counterbalance means connected to the ground ladder and a horizontally movable

latch normally closing the bottom of one groove and forming a supporting abutment for the ground ladder.

4. A fire escape comprising an upper and a lower platform having relatively alined open hatchways, the lower platform having opposed vertical grooves adjacent the hatchway, an intermediate stationary ladder, the upper ends of the side rails of said ladder being secured to the upper platform and the lower ends of said side rails secured to the lower platform adjacent the vertical grooves, a ground ladder slidable in said grooves, counterbalance means connected to the ground ladder and manually operated means normally closing the lower end of one of the grooves and supporting the ground ladder in elevated position.

III.

That the same was a new and useful invention not known or used by others in this country, not patented, not described in any particular publication in this or any foreign country [2] before the invention thereof by your complainant, and, at the time of his application for a patent therefor, as hereinafter alleged, the same had not been in public use, nor on sale, in the United States more than two years, nor had the same been abandoned.

IV.

That thereafter, to wit, on September 4th, 1919, your complainant duly and regularly filed in the patent office of the United States an application praying for the issuance to him of letters patent of the United States for said invention, and after

proceedings duly and regularly had and taken in the matter, to wit, June 15th, 1920, letters patent of the United States bearing date on that day and numbered 1,343,642, were granted, issued and delivered to your complainant, whereby there was granted to him, his heirs and assigns for the full term of seventeen years from said last-named date, the sole and exclusive right to make, use and vend the said invention throughout the United States and the territories thereof. Said letters patent were issued in due form of law under the seal of the patent office of the United States, signed by the Acting Commissioner of Patents, and prior to the issuance thereof all proceedings were had and taken which were required by law to be had and taken prior to the issuance of letters patent for new and useful inventions.

V.

That since the issuance of said letters patent, complainant has been and is now the sole owner and holder thereof, and has practiced the invention described therein, and has used large numbers of said fire escapes thereby giving notice to the public at large that the device was covered by said letters patent.

VI.

That the names of the defendants herein designated as John Doe, Richard Roe, Sam Hill, James Doe and Mary Roe are [3] fictitious, but are jointly connected and associated with the other defendants in operating and embracing the invention patented in and by said letters patent, and all of the herein

defendants are engaged in manufacturing, using and vending said patented invention and the fire escapes so manufactured, used and sold by said defendants are an infringement of said letters patent.

VII.

That notwithstanding the premises, but well knowing the same, and without the license or consent of your complainant, within one year last past, and in the Southern District of California, Southern Division, the defendants herein have jointly manufactured, used and sold large numbers of fire escapes containing and embracing the invention described and patented in and by said letters patent and the claims thereof, and have infringed upon the exclusive rights secured to your claimant by said claims; that your complainant has requested the defendants to cease and desist from infringing upon said letters patent, but the fact is, nevertheless, that the said defendants have failed, neglected and refused to comply with such request and are now still manufacturing, using and selling said patented invention and threaten to so manufacture, use and sell them, and, unless restrained by this court will continue to so manufacture, use and sell the same.

VIII.

That by reason of the premises your complainant has suffered great and irreparable injury and damage, and he avers, upon information and belief, that the defendants have realized large profits and gains in the sum of fifteen thousand ($15,000) dollars.

That for the wrongs and injuries herein complained of your complainant has no plain, speedy or adequate remedy at law. [4]

WHEREFORE, complainant prays:

First. That said defendant may be decreed to account for and pay over to your complainant the gains and profits realized by said defendants from their unlawful use and practice of the invention patented in and by said letters patent, and, in addition to the profits to be accounted for, as aforesaid, the damages sustained by your complainant, together with the costs of suit;

Second. That a writ of injunction issue out of and under the seal of this court, provisionally, and until the final hearing, enjoining and restraining the said defendants, their clerks, employees, agents and attorneys from making, using and selling any fire escape containing and embodying the invention patented in and by said claims 1, 2, 3 and 4, or either or any of them, and that, upon the final hearing of the case said injunction be made permanent; and

Third. That complainant be given such other and further relief as the nature of the case may require and as may seem meet and proper in accordance with equity.

STEPHEN MONTELEONE,
Solicitor for Complainant.

United States of America,
Southern District of California,
County of Los Angeles,—ss.

Charles Henry Pray being duly sworn, deposes

and says that he is the complainant in the within action; that he has read the above and foregoing bill of complaint and knows the contents thereof; that the same is true of his own knowledge, except as to the matters which are therein stated on his information or belief, and, as to those matters, that he believes it to be true.

CHARLES HENRY PRAY.

Subscribed and sworn to before me this 18th day of January, 1922.

[Seal] MAI FIELD DOUGLAS,

Notary Public in and for the County of Los Angeles, State of California.

My commission expires Dec. 13, 1925. [5]

Endorsed]: F.–89—Equity. In the District Court of the United States in and for the Southern District of California, Southern Division. Charles Henry Pray, Plaintiff, vs. W. B. Copes, et al., Defendants. Bill in Equity for Accounting and Injunction. Filed Jan. 20, 1922. Chas. N. Williams, Clerk. By Edmund L. Smith, Deputy Clerk. Stephen Monteleone, 806 Security Building, 5th and Spring Streets, Los Angeles, Phone: Main 5722. [6]

In the District Court of the United States in and for the Southern District of California, Southern Division.

CHARLES HENRY PRAY,

Complainant,

vs.

W. B. COPES and J. E. HILL, Doing Business Under the Fictitious Firm Name of TRIANGLE IRON WORKS, TRIANGEL IRON WORKS, JOHN DOE and RICHARD ROE, Doing Business Under the Fictitious Firm Name of NATIONAL FIRE ESCAPE LADDER COMPANY, BYRON JACKSON IRON WORKS, a Corporation, SAM HILL, JAMES DOE and MARY ROE,

Defendants.

ANSWER.

Now comes the defendants W. B. Copes and J. E. Hill, doing business under the ficticious firm name of Triangle Iron Works, Triangle Iron Works, W. A. Samson and John Fitzgerald, doing business under the fictitious firm name of National Fire Escape Ladder Company, and for answer to the bill in equity for accounting and injunction filed by complaint herein against these defendants, and others, deny and alleges:

I.

Deny that on the 15th of June, 1920, or at any

time, or at all, complainant was the original or first inventor of a certain new or useful invention entitled "Fire Escapes," more particularly described in the complainant's bill of equity on file herein.

II.

Deny that the same was a new or useful invention not known or used by others in this country before the invention thereof by your complainant, and deny that at the time of the application for patent therefor, as hereinafter alleged, the same [7] had not been in public use, or on sale, in the United States for more than two years prior thereto, or that it had not been abandoned.

III.

Defendants have not sufficient information or belief to enable them to answer the allegations of paragraph IV of complainant's bill of equity, and on that ground deny that said letters of patent were issued in due form of law under the seal of the patent office of the United States, signed by the Acting Commissioner of Patents or prior to the issuance thereof all proceedings were had or taken which were required by law to be had or taken prior to the issuance of letters patent for new or useful inventions, or at all.

IV.

Deny that these defendants are jointly connected or associated with each other or the other defendants in operating or embracing the invention patented in or by said letters patent, and deny that they are engaged in manufacturing or using or

vending said patented invention or the fire escapes so manufactured or used or sold by defendants are an infringement of said letters patent, or at all.

V.

Deny that within one year last past, in the Southern District of California, Southern Division, or at all, these defendants have jointly manufactured, used and sold or jointly manufactured or used or sold large numbers of fire escapes containing or embracing the invention described or patented in or by said letters patent or the claims thereof, and deny that they have infringed upon the alleged exclusive rights secured by complainant by said claims; deny that complainant has requested defendants to cease or desist from infringing upon said letters patent; deny that defendants are still manufacturing, using and selling [8] or manufacturing or using or selling said patented invention, and deny that they threaten to so manufacture, use and sell or manufacture or use or sell them, and deny that unless restrained by the Court they will continue to so manufacture or use or sell them.

VI.

Deny that complainant has suffered great and irreparable or great or irreparable injury and damage or injury or damage, and deny that defendants have realized large profits and gains, or large profits or gains in the sum of $15,000, or any sum, or at all.

WHEREFORE, these defendants pray that the complainant's bill in equity be dismissed, for their

costs herein, and for such other and further relief as may be meet and just.

DAN V. NOLAND,
Attorney for Said Defendants.

United States of America,
Southern District of California,
County of Los Angeles,—ss.

W. A. Samson, being first duly sworn, deposes and says: that he is one of the defendants in the within action; that he has read the above and foregoing answer, and knows the contents thereof; that the same is true of his own knowledge, except as to those matters therein stated on his information or belief, and as to those matters, that he believes it to be true.

W. A. SAMSON.

Subscribed and sworn to before me this 27th day of February, 1922.

[Seal] ALFREDA M. DAIMLER,
Notary Public in and for the County of Los Angeles, State of California.

Received copy of the within answer this 27th day of February, 1922.

STEPHEN MONTELEONE,
By D. H. C.
Attorney for Plaintiff. [9]

[Endorsed]: Original No. F.-89—Equity. In the United States District Court in and for the Southern District of California, Southern Division. Charles Henry Pray, Complainant, vs. W. B. Copes, et al., Defendants. Answer. Filed Feb. 27,

1922. Chas. N. Williams, Clerk. By L. J. Cordes, Deputy Clerk. Dan V. Noland, Union Oil Building, Los Angeles, Cal. [10]

In the United States District Court, Southern District of California, Southern Division.

IN EQUITY—No. F.-89.

CHARLES HENRY PRAY,

Complainant,

vs.

W. B. COPES and J. E. HILL, etc., et al.,

Defendants.

MOTION AND NOTICE THEREOF.

Please take notice that on Monday, April 10, 1922, at the hour of 10 o'clock A. M., or as soon thereafter as counsel can be heard, and in the courtroom of this court usually occupied by the Honorable Benjamin F. Bledsoe, a judge thereof, in the Federal Building, Los Angeles, California, the plaintiff will move this Honorable Court for an order striking out the answer of defendants, pursuant to Equity Rule 58, and the provisions thereof pertinent to the order made and filed March 15, 1922, requiring defendants to answer certain interrogatories pursuant to said Equity Rule 58.

This motion will be based upon said Equity Rule 58 and the papers, files, documents and proceedings in this cause.

To DAN V. NOLAND, Esq., Solicitor for Defendants.

Dated Los Angeles, Cal., April 4, 1922.

RAYMOND IVES BLAKESLEE,

_____,

Solicitors and Counsel for Plaintiff.

[Endorsed]: In Equity—No. F.–89. In the United States District Court Southern District of California, Southern Division. Charles Henry Pray, Plaintiff, vs. W. B. Copes and J. E. Hill, etc., et al., Defendants. Motion and Notice Thereof. Received copy of within notice this 4th day of April, 1922. Dan V. Noland, Attorney for Defts. Filed Apr. 5, 1922. Chas. N. Williams, Clerk. By Edmund L. Smith, Deputy Clerk. Raymond Ives Blakeslee, 727–30 California Building, Los Angeles, Cal., Solicitor for Plaintiff. [11]

At a stated term, to wit: the January, A. D. 1922, Term, of the District Court of the United States of America, within and for the Southern Division of the Southern District of California, held at the courtroom thereof, in the city of Los Angeles, on Monday, the tenth day of April, in the year of our Lord one thousand nine hundred and twenty-two. Present: The Honorable BENJAMIN F. BLEDSOE, District Judge.

No. F.–89—Eq.

CHARLES HENRY PRAY,

Plaintiff,

vs.

W. B. COPES and J. E. Hill, etc.,

Defendants.

MINUTES OF COURT—APRIL 10, 1922—ORDER DENYING MOTION TO STRIKE.

This cause coming on at this time for hearing on motion to strike answer; J. Calvin Brown, Esq., appearing as counsel for the plaintiff and V. H. Koenig, Esq., appearing as counsel for the defendant and J. Calvin Brown, Esq., having made a statement in support of motion to strike and said V. H. Koenig, Esq., having made a statement in opposition thereto, it is by the Court ordered that said motion be and the same is hereby dismissed. [12]

In the United States District Court, Southern District of California, Southern Division.

IN EQUITY—F.–89.

CHARLES HENRY PRAY,

Complainant,

vs.

W. B. COPES et al.,

Defendants.

MOTION AND NOTICE THEREOF.

Please take notice that on Monday, April 24, 1922, at the hour of ten o'clock A. M., or as soon thereafter as counsel can be heard, and in the courtroom of this court usually occupied by the Hon. Benjamin F. Bledsoe, a judge of this court, in the Federal Building, Los Angeles, California, or at such other time and place as may be assigned for that purpose, plaintiff will move this Honorable Court for an order compelling defendants and each of same, to fully and particularly and specifically and properly answer interrogatories herein previously propounded to them and each of them under and pursuant to the order of this Court.

This motion is presented pursuant to Equity Rule 58 and is based upon the interrogatories heretofore propounded by plaintiff to defendants, the order of the Court and the answers of defendants, or purported answers of defendants filed herein by defendants and alleged to be responsive to such interrogatories.

This motion is also based upon the papers, files, records and proceedings heretofore taken and had and on file in this cause.

As authorities on this motion plaintiff relies upon the prior rulings of this Court as in Wilson vs. Union Tool Co., 275 Fed. 624, and Quirk vs. Quirk, 259 Fed. 597.

To Defendants W. B. COPES et al., and Their Solicitor and Counsel, VICTOR H. KOENIG.

Dated Apr. 18, 1922.

RAYMOND IVES BLAKESLEE,
J. CALVIN BROWN,
Solicitors and Counsel for Plaintiff. [13]

[Endorsed]. In Equity—No. F.–89. In the United States District Court, Southern District of California, Southern Division. Charles Henry Pray, Plaintiff, vs. W. B. Copes et al., Defendants. Motion and Notice Thereof. Received copy of within notice this 18th day of April, 1922. Victor H. Koenig, Attorney for Defts. Filed Apr. 19, 1922. Chas. N. Williams, Clerk. By Edmund L. Smith, Deputy Clerk. Raymond Ives Blakeslee, 727–30 California Building, Los Angeles, Cal., and J. Calvin Brown, Solicitors for Plaintiff. [14]

In the United States District Court, Southern District of California, Southern Division.

IN EQUITY—No. F.–89.

CHARLES HENRY PRAY,
Complainant,

vs.

W. B. COPES, J. E. HILL, etc, et al.,
Defendants.

INTERLOCUTORY DECREE.

This cause having come on to be heard and having been argued by counsel; now, therefore, upon

consideration thereof, it is hereby ORDERED, ADJUDGED AND DECREED, as follows, viz.:

I.

That United States letters patent No. 1,343,642, issued June 15, 1920, to Charles Henry Pray, are good and valid in law as to each and all of the claims thereof.

II.

That the plaintiff is the owner of said letters patent.

III.

That the defendants have infringed each of the claims of said letters patent, to wit: Claims 1, 2, 3 and 4 thereof, by making, using and selling devices as admitted, specified and set forth and shown in defendants' answer to interrogatories propounded by plaintiff, and each and all of such answers, and blue-print referred to in such answers, all on file herein.

IV.

That an injunction be issued against defendants W. B. Copes and J. E. Hill, doing business under the fictitious firm name of Triangle Iron Works, and M. J. Fitzgerald and W. A. Samson, doing business under the fictitious firm name of National Fire Escape Ladder Company, perpetually enjoining and restraining them, their officers, directors, agents, attorneys, workmen, [15] servants, employees and associates, and each and every of them, from hereafter making or causing to be made, selling or causing to be sold, using or causing to be used, in any manner, directly or indirectly,

or contributorily, any device like those admitted, specified and set forth and shown in defendants' answers to interrogatories propounded by plaintiff, and each and all of such answers, and blue-print referred to in such answers, all on file herein; or any device or mechanism containing or embodying the invention patented in or by claims 1, 2, 3 and 4, or either thereof of said letters patent, or any device capable of being used in infringement thereof, and from directly or indirectly infringing upon either or any of claims 1, 2, 3 and 4 of said letters patent in any manner whatsoever.

V.

That plaintiff recover from defendants W. B. Copes and J. E. Hill, doing business under the fictitious firm name of Triangle Iron Works, and from M. J. Fitzgerald and W. A. Samson doing business under the fictitious firm name of National Fire Escape Ladder Company, and each of them, the profits and damages received from and caused by said defendants' infringement of said letters patent.

VI.

That an accounting be had to determine the profits and damages received from and caused by such infringements by said defendants.

VII.

That this cause be referred to Chas. C. Montgomery, Esq., as Master *pro hac vice* to ascertain such profits and damages and report the same to the Court; and that the matter of increased damages be deferred until after the Master's report is returned. [16]

VIII.

That plaintiff have and recover judgment against defendants W. B. Copes and J. E. Hill, doing business under the fictitious firm name of Triangle Iron Works, and M. J. Fitzgerald and W. A. Samson, doing business under the fictitious firm name of National Fire Escape Ladder Company, and each of them, for the sum of $27.55, plaintiff's costs and disbursements herein.

Dated July 18th, 1922.

BENJAMIN F. BLEDSOE,
U. S. District Judge.

Approved as to form pursuant to Court Rule 45.

_____,
VICTOR H. KOENIG,
Solicitors for Defendants.

Decree entered and recorded July 18th, 1922.

CHAS. N. WILLIAMS,
Clerk.
By Douglas Van Dyke,
Deputy Clerk.

[Endorsed]: In Equity—No. F.–89. In the United States District Court, Southern District of California, Southern Division. Charles Henry Pray, Plaintiff, vs. W. B. COPES, J. E. Hill, etc., et al., Defendants. Interlocutory Decree. Filed Jul. 18, 1922. Chas. N. Williams, Clerk. By Douglas Van Dyke. J. Calvin Brown, Raymond Ives Blakeslee, 727–30 California Building, Los Angeles, Cal., Solicitors for Plaintiff. 11/181. [17]

In the United States District Court, Southern District of California, Southern Division.

IN EQUITY—No. F.-89.

CHARLES HENRY PRAY,

Complainant,

vs.

W. B. COPES and J. E. HILL, Doing Business Under the Fictitious Firm Name of TRIANGLE IRON WORKS, M. J. FITZGERALD and W. A. SAMSON, Doing Business Under the Fictitious Firm Name of NATIONAL FIRE ESCAPE LADDER COMPANY,

Defendants.

AFFIDAVIT ON MOTION TO SET ASIDE DECREE.

To the Honorable B. F. BLEDSOE, Judge of said court:

The petition of W. A. Samson and M. J. Fitzgerald by G. E. Harpham, their attorney, and W. B. Copes and J. E. Hill by Douglas L. Edmonds, their attorney, respectfully asks that the interlocutory decree entered in the above-entitled action on July 18, 1922, be vacated and set aside and a rehearing granted herein and that they be permitted to withdraw their answers to plaintiff's interrogatories, and that they be permitted to file amended answers to the end that justice be done between plaintiff and defendants.

In that behalf these defendants say that after they were served with process in this action they consulted together and intrusted the matter of the defense of the action to defendant W. A. Samson; that none of the defendants were acquainted with patent law or what was necessary to do to present their defense in the action; that W. A. Samson employed Victor H. Koenig, a general practitioner, to represent them in the action and to prepare their answers and such other papers and pleadings as were necessary to properly present their defense in the action.

That said Victor H. Koenig had acted as attorney for said W. A. Samson in an action in the state courts with success and these defendants believed he could and would present their [18] defense to this action in a proper manner and to the end that the Court should be fully advised as to the rights and liabilities of the parties; that said Victor H. Koenig told these defendants that he would procure the assistance of R. S. Berry, who was reputed to be skilled in patent law, in preparing the answer and such other papers as were required.

That they trusted to said Koenig to see that the answer of these defendants was properly prepared and presented all the matters that were required to be stated therein, to properly plead their defense to the action.

That they furnished said Koenig with blue-prints of the construction of the ladder which these defendants made and installed and sold for use in fire

escapes and endeavored to explain the same to said Koenig and thought they had done so, and that said Koenig understood the construction and use of the ladder until after the trial of the action and after the rendition of the judgment; that from the manner that said Koenig conducted the trial of the action, these defendants became convinced that he did not understand the action and that their defense had not been properly presented and were then informed that said Berry had not been consulted. Said Samson then employed G. E. Harpham on behalf of the defendants Samson and Fitzgerald and said Copes and Hill employed Douglas L. Edmonds to represent them.

That said Harpham has been an attorney at law, duly licensed to practice his profession in all the courts of California, both State and Federal, for more than forty years and has had considerable practice in the Federal Courts of California in patent litigation; that said Harpham examined the papers, records and files in this action and the ladder which these defendants made and installed in fire escapes and after such examination, informed these defendants that their answer was not full enough to properly present to the court their defense to the action; that their answer should have set out the prior art as to fire [19] escapes so as to restrict plaintiff to the exact structure of his patent and if that had been done, the court would not have found that the ladder made by defendants and installed in fire escapes was an infringement of plaintiff's patent.

Said Harpham also informed defendants that certain portions of their answers to interrogatories three and nine were not correct; that the defendants had admitted the use of certain things in said answers which they had not used and that the ladder which these defendants had made and sold did not come within the claims of plaintiff's patent; that said Harpham then took a copy of plaintiff's patent and went over the claims thereof in front of a fire escape in which a ladder made and sold by defendants was installed and pointed out wherein such ladder was not covered by said claims.

These defendants now state that those portions of their answers to plaintiff's interrogatories which state that the ladders which they made and sold are in all respects similar, except in certain particulars set forth, with the ladder described in interrogatory three, are incorrect and were made inadvertently and under advice of counsel, who it now appears did not understand the construction of the ladders involved; that their answers to paragraphs a, b, c, d and g should have been "no" instead of "yes" for the same reason; that these defendants, or any of them, never constructed or used or sold any fire escapes having a second and third floor platform with a permanent connecting ladder between the same; that these defendants, or any of them, never constructed any platforms or permanent ladders for use in a fire escape, nor any ground ladder for use in a fire escape that was slidable upon a permanent ladder; that their answers to plaintiff's interrogatories were put in by said Koe-

nig under a misunderstanding of the construction of the ladder made and sold by these defendants and under a misunderstanding of what these defendants did in relation to fire escape construction. [20]

In that behalf, these defendants say they have never built, or had built for them, any second and third story platforms with a permanent ladder extending from one to the other; that they have never made or installed any movable ground ladder which was held in sliding contact or engagement, or any contact or engagement, with the permanent ladder which in fire escapes extends from the second to the third story platform.

That the only thing that these defendants, or any of them, have ever done in relation to fire escapes is as follows:

In the construction of buildings in the city of Los Angeles certain buildings have been constructed by the owners thereof which, by the ordinances of the city of Los Angeles, were required to be equipped with fire escapes; that the owners of such buildings, when the same were constructed and as a part thereof, built platforms at each floor from the second story up and provided permanent ladders extending from platform to platform; that all these defendants, or any of them did was to provide a movable ladder that was held above the ground and which could be lowered to the ground in case of a fire in the building and on which persons could descend from the second story platform to the ground on such ladder, which ladders are called movable ground ladders; that in the making and

installation of the ground ladders made and sold and installed by defendants for the owners of buildings having platforms at each floor above the ground, these defendants did not use or sell or install any ground ladders which had a sliding or any other engagement with the permanent ladder which extends from the second to the third platforms; that the ground ladder made and sold and installed by the defendants was in sliding contact with a guide that was attached to the second and third platforms, as described in U. S. letters patent No. 1,140,708, issued to Julius Pauly May 25, 1915, a copy of which will be produced on the hearing; except that there are some slight differences in the form of guide and the attachment of the ladder to the guide; defendants further say that a sliding engagement of the ground ladder upon the permanent ladder which [21] extends from the second to the third balcony is illustrated and partly described at page 37 in the catalogue of the F. P. Smith Wire and Iron Works, published at Chicago, Illinois, in the year 1915, which catalogue, as these defendants are informed and believe, had and has a large circulation in the United States ever since the year 1915, and was copyrighted in the year 1915, by F. P. Smith; and that such fire escapes have been made by the said F. P. Smith Wire and Iron Works for twenty-five years last past and have been in use in and about the city of Chicago during the same period of time.

That a photograph of the front of a building showing a fire escape located at No. 416 West

Fourth Street, Los Angeles, California, is hereto attached, marked Exhibit "A" and made a part hereof; that in said photograph the second story platform of the fire escape is marked "2" and the third story platform is marked "3"; the permanent ladder is marked "4"; the ground ladder is marked "5"; the ground ladder guide is marked "6." The ground ladder is shown in its elevated and inoperative position. Another photograph of the same front is hereto attached, marked Exhibit "B" and made a part hereof. In Exhibit "B" all the parts shown in Exhibit "A" are the same but the position of the ground ladder is shown in its operative position ready for use. Ground ladder "5" and its manner of attachment to guide "6," and of the attachment of guide "6," to platform "2" and "3" are correctly shown in said photographs.

The said photographs represent the only form of ground ladder and guide and the manner of the attachment of the ground ladder guide to the platforms of a fire escape ever made or sold by these defendants to anyone; that these defendants never made, either directly or indirectly, any platforms for fire escapes or any permanent ladders for fire escapes that extended from platform to platform.

That these defendants trusted solely to said Koenig to prepare their defense and did not know, until informed by said Harpham, that their answer was not full enough to properly present the defense of the prior art and did not know that certain portions of their answer to interrogatories three and nine were [22] not correct and that they had admitted

the use of certain elements which established plaintiff's allegation of infringement, and were surprised and dumbfounded when said Harpham explained the matter to them.

That if the decree of July 18, 1922, be set aside and their answers to the interrogatories be withdrawn and proper pleadings and testimony put in, these defendants are informed by their counsel and verily believe that the court will enter a judgment that the ladders made and sold and installed by these defendants are not an infringement of the patent sued on herein.

WHEREFORE these defendants pray that said decree of July 18, 1922, be set aside and the answers to the interrogatories heretofore filed herein, be withdrawn and that the case be reopened for further hearing and determination.

J. E. HILL.
W. B. COPES.
W. A. SAMSON.

G. E. HARPHAM,
Solicitor for Defendants Samson and Fitzgerald.

DOUGLAS L. EDMONDS,
Solicitor for Defendants Copes and Hill.

[23]

State of California,
County of Los Angeles,—ss.

W. A. Samson, W. B. Coates and J. E. Hill, defendants in the above-entitled action, being first duly sworn, each for himself and not one for the other, says that he has heard read the foregoing

petition. That all the statements in said petition contained are true and correct to the best of the knowledge, information and belief of affiants. That said petition is not put in for delay.

J. E. HILL.
W. B. COPES.
W. A. SAMSON.

Subscribed and sworn to before me this 11th day of August, 1922.

[Seal] DOUGLAS L. EDMONDS,
Notary Public in and for the County of Los Angeles, State of California. [24]

EXHIBIT "A."

EXHIBIT "B."

In the United States District Court, Southern District of California, Southern Division.

IN EQUITY.—No. F.-89.

CHARLES HENRY PRAY,

Complainant,

vs.

W. B. COPES and J. E. HILL, Doing Business Under the Fictitious Firm Name of TRIANGLE IRON WORKS, M. J. FITZGERALD and W. A. SAMSON, Doing Business Under the Fictitious Firm Name of NATIONAL FIRE ESCAPE LADDER COMPANY,

Defendants.

NOTICE OF MOTION TO VACATE THE DECREE.

To the Said Plaintiff and to Messrs. Stephen Monteleone, Raymond Ives Blakeslee and J. Calvin Brown, His Solicitors:

All and each of you will please take notice that on Monday, September 4, 1922, upon the opening of court on said day, or as soon thereafter as counsel can be heard in the courtroom of the Honorable B. F. Bledsoe, counsel for defendants will bring the foregoing petition on for hearing and on said hearing will refer to and use the records, papers and files in said action, and the patents and catalogue referred to in said petition.

Dated August 11, 1922.

G. E. HARPHAM,

Solicitor for Defendants Samson and Fitzgerald.

DOUGLAS L. EDMONDS,

Solicitor for Defendants Copes and Hill.

[Endorsed]: Original. F.–89—Equity. In the United States District Court, Southern District of California, Southern Division. Charles Henry Pray, Complainant, vs. W. B. Copes et al., Defendants. Notice of Motion to Vacate Decree and Affidavit thereon. Filed Aug. 14, 1922. Chas. N. Williams, Clerk. By L. J. Cordes. Received copy of the within this 14th day of August, 1922. Raymond Ives Blakeslee, J. Calvin Brown, Solicitors for Plaintiff. G. E. Harpham and Douglas L. Edmonds, 716 Van Nuys Building, Los Angeles, Cal. Telephones: 6080, Main 1936, Attorneys for Defendants. [25]

At a stated term, to wit, the January, A. D. 1923, term of the District Court of the United States of America, within and for the Southern Division of the Southern District of California, held at the courtroom thereof, in the city of Los Angeles, on Friday, the 26th day of January, in the year of our Lord one thousand nine hundred and twenty-three. Present: the Honorable BENJAMIN F. BLEDSOE, District Judge.

No. F.-89—EQUITY, S. D.

CHARLES HENRY PRAY,

Plaintiff,

vs.

W. B. COPES et al.,

Defendants.

MINUTES OF COURT—JANUARY 26, 1923—ORDER VACATING INTERLOCUTORY DECREE, ETC.

Good cause appearing therefor, it is by the Court ordered that upon payment of $200.00 as terms to be made within ten days from date, an order will be made by the Court vacating the interlocutory decree heretofore entered herein, permitting defendants to file an amended answer setting up non-infringement and relieving them from the prejudicial admissions contained in the answers to the interrogatories on file. [26]

In the United States District Court, Southern District of California, Southern Division.

F.-89—EQUITY.

CHARLES HENRY PRAY,

Complainant,

vs.

W. B. COPES, J. E. HILL et al.,

Defendants.

Messrs. BLAKESLEE & BROWN of Los Angeles, Cal., Attorneys for Complainant.

G. E. HARPHAM, Esq., of Los Angeles, Cal., Attorney for Defendants.

MEMORANDUM OPINION.

BLEDSOE, District Judge.—This is a motion for a vacating of the interlocutory decree entered herein and the granting of a rehearing of the cause on the merits.

It is fairly clear from the papers presented by defendants that they employed an attorney to represent them at the hearing on the merits who possessed a woeful want of appreciation of the intricacies of patent law. Acting under his advice, it seems clear that defendants were misled to their prejudice in the matter of the preparation of their defenses. It is equally clear from an inspection of plaintiff's patent, the device of which must be limited to a sliding ladder operated in conjunction with or at least in the immediate vicinity of a fixed ladder, that defendants' device does not infringe upon plaintiff's patent. This was not made to appear at the hearing and on the contrary seemingly was foreclosed from consideration by the court if it had been presented, by the nature of defendants' answers to interrogatories.

On that basis an injustice has been done due to the ineptitude of defendants' counsel. Seasonable application for relief having been made, it would seem proper that the court should grant a rehearing in order that justice may be done. The

defendants, however, because of the negligence or ignorance of their own agent, their counsel, are responsible for the present situation [27] and they should be permitted relief only in the event of the payment of terms.

Upon the payment, therefore, of the sum of two hundred dollars as terms, an order will be made by the Court vacating the interlocutory decree heretofore entered herein and permitting defendants to file an amended answer and relieving them from the prejudicial admissions contained in the answers to the interrogatories on file.

January 26, 1923.

[Endorsed]: No. F.–89—Eq. U. S. District Court, Southern District of California. Charles Henry Pray vs. W. B. Copes, J. E. Hill, et al. Opinion of Court on Rehearing. Filed Jan. 26, 1923. Chas. N. Williams, Clerk. By Edmund L. Smith, Deputy Clerk. [28]

In the District Court of the United States Southern District of California, Southern Division.

CHARLES HENRY PRAY,

Complainant,

vs.

W. B. COPES et al.,

Defendants.

ORDER SETTING ASIDE INTERLOCUTORY DECREE.

The defendants having paid to Messrs. Blakeslee and Brown, as solicitors for the plaintiff in the above-entitled action, the sum of Two Hundred ($200.00) Dollars as terms imposed in an order made herein on the 26th day of January, 1923, and having filed the receipt for said payment herewith,

IT IS ORDERED that the interlocutory decree heretofore made herein on the 18th day of July, 1922, be vacated, and that the defendants be permitted to file amended answers within ten days from this date and that said defendants be relieved from the prejudicial admissions contained in the answers to the interrogatories heretofore filed herein and be permitted to withdraw said answers and to file amended answers to said interrogatories.

Dated: February 5th, 1923.

BLEDSOE,
United States District Judge.

[Endorsed]: No. F.–89. In the District Court of the United States, Southern District of California, Southern Division. Charles Henry Pray, Complainant, vs. W. B. Copes, et al., Defendant. Order vacating injunction and setting aside decree. Filed Feb. 5, 1923. Chas. N. Williams, Clerk. By Edmund L. Smith. Douglas L. Edmonds, 716 Van Nuys Building, Los Angeles, Cal. Telephones 60580 Main 1963, Attorney for Defendants. EOBk 3/65. [29]

In the United States District Court, Southern District of California, Southern Division.

IN EQUITY—No. F.-89.

CHARLES HENRY PRAY,

Plaintiff,

vs.

W. B. COPES et al.,

Defendants.

NOTICE OF PETITION.

To defendants in the above-entitled cause, and their solicitors and counsel George E. Harpham and Douglas L. Edmonds, Esqrs.:

Please take notice that on Monday, the 19th day of February, 1923, at the hour of ten o'clock A. M., or as soon thereafter as counsel can be heard, plaintiff will present to this Honorable Court the annexed petition for rehearing, etc., at the courtroom of this Court usually occupied by the Honorable Benjamin F. Bledsoe, in the Federal Building, Los Angeles, California.

RAYMOND IVES BLAKESLEE.
J. CALVIN BROWN.

Dated Los Angeles, Cal., Feb. 13, 1923. [30]

In the United States District Court, Southern District of California, Southern Division.

IN EQUITY—No. F.–89.

CHARLES HENRY PRAY,

Plaintiff,

vs.

W. B. COPES et al.,

Defendants.

PETITION FOR REHEARING OF DEFENDANT'S PETITION TO VACATE AND SET ASIDE INTERLOCUTORY DECREE AND PERMIT DEFENDANTS TO FILE AN AMENDED ANSWER AND STRIKE OUT ANSWERS TO INTERROGATORIES PROPOUNDED BY PLAINTIFF, ETC.

Now comes plaintiff hereinabove named by counsel and petitions this Court for a rehearing in the matter of defendants' heretofore presented and argued petition to vacate and set aside the interlocutory decree herein and strike out answers to the interrogatories heretofore propounded by plaintiff, and permit amended answers, and plaintiff further petitions for an order vacating and setting aside the order of this Court heretofore entered granting defendants' said petition.

Plaintiff further petitions for an order permitting plaintiff, upon the granting of the relief herein petition for, to return to the defendants

Copes and Hill the sum of two hundred dollars ($200.00) heretofore paid by said defendants to plaintiff as terms in accordance with the said order of the Court heretofore made and entered on said petition to plaintiff.

This present petition is based upon the papers, proceedings, proofs, evidence, records, decree and order heretofore had, made and now on file in this cause, upon Federal Equity Rule 19 and the other pertinent equity rules, the statutes of the United States and the discretionary powers of this Court, and more particularly upon the following grounds and authorities, and the annexed transcript of a portion of the testimony heretofore taken in the accounting ordered in this matter: [31]

(a) That defendants answered said interrogatories of plaintiff of their own volition and as their own acts, and with a full understanding of said interrogatories, and answered same in accordance with the facts as shown by the papers on file herein, disclosing the structure to build and install only which certain of said defendants were given permission by the authorities of the city of Los Angeles, and as further shown by the photographs and affidavits on file indicating the construction with which the Times Building of Los Angeles, California, is equipped.

(b) That defendants' affidavits and photographs filed and presented on said petition of defendants were clearly erroneous and untrue.

(c) That defendants accompanied their said interrogatory answers with a blue-print on file

clearly indicating by the "rungs" the rungs or steps of both the fixed and ground ladders which they admitted having made and installed, and that the presence of any one or more of such rungs completes the structure to the extent that it falls within the definition of a ladder.

(d) That the defendants admit in their interrogatory answers their clear understanding of the interrogatories and the structures involved therein by their recitals as to the alleged antiquity in various structural parts disclosed in the patent in suit.

(e) That whether or not the first counsel employed by defendants and who tried this cause was capable or incapable of comprehending and presenting, and adducing proof with respect to the issues of, this cause, is entirely irrelevant and immaterial, and devoid of weight on issues presented in this cause or for any reason offered in the memorandum of this Court on the motion of defendants, inasmuch as defendants were foreclosed by their interrogatory answers from adducing any proofs at the trial available to defendants, unless it were to totally anticipate [32] the patent in suit, and that new counsel for defendants have entirely waived this ground of defense by admitting on arguing and briefing the said petition that defendants waived the grounds of newly discovered evidence.

(f) That the said memorandum opinion of this Honorable Court on said petition of plaintiff is prejudicial to a rehearing of this cause in the observation that it is clear that defendants' device

does not infringe upon plaintiff's patent, such a finding by this Court in advance of the rehearing being in effect indicative of the purpose of the Court to enter an order and decree or order judgment herein *non obstante veredicto* against the rule of Foster's Federal Practice Vol. III, Sec. 478, page 2474, and Slocum vs. N. Y. Life Ins. Co., 228 U. S. 364.

(g) That within the Code of Civil Procedure of this State, Sec. 657, and within the Federal Equity Practice, as indicated by Walker on Patents, Secs. 645, 646 and 647, Fifth edition, the said memorandum opinion of the Court and order made and entered thereon do not follow and are not based upon the required grounds to be presented for a rehearing.

(h) That inasmuch as plaintiff cannot immediately appeal from the said order of the Court on said defendants' petition, the same being discretionary and not a final order, or at least inasmuch as no appeal involving such order can eventually be taken until a further interlocutory decree has been made and entered in this cause, the present petition is presented in order that, if defendants be so advised, application may be made to the Honorable Circuit Court of Appeals of this Ninth Circuit for a writ of prohibition directed against the carrying into effect of said order on said plaintiff's petition.

(i) That the said order of this court on said petition of defendants is contrary, in its provision for the filing of an amended answer by defendants,

to the concession on the argument of said petition of defendants, made by Counsel Harpham in open Court, that defendants do not rely upon newly discovered evidence, and that nothing appears in this cause to warrant any permission to amend the answer herein, no other grounds having [33] been advanced by defendants in their said petition, as required by the authorities herein relied upon.

(k) That there is nothing in the patent in suit indicating the number of rungs which a ladder between second and third balconies must contain to be a ladder, and the omission of one or more such rungs from a given ladder would still leave the structure of a ladder *pro tanto,* and would enable use of the same for many purposes and constituting a continuing temptation to users to add other rungs for such further purposes as might be preferable or desired, if necessary, such ladder structures with certain rungs omitted being clearly contributory infringements.

Respectfully submitted,
RAYMOND IVES BLAKESLEE,
J. CALVIN BROWN,
Solicitors and Counsel for Plaintiff.

Dated Los Angeles, Feb. 13, 1923. [34]

In the United States District Court, Southern District of California, Southern Division.

IN EQUITY—No. F.–89.

CHARLES HENRY PRAY,

Plaintiff,

vs.

W. B. COPES et al.,

Defendants.

AFFIDAVIT OF SERVICE.

State of California,
County of Los Angeles,—ss.

Alan Franklin being duly sworn according to law, says: That he is an attorney at law and connected with the offices of Blakeslee & Brown, solicitors and counsel for plaintiff in the above-entitled cause in Equity; that on the 14th day of Feb., 1923, he served a true and correct copy of the foregoing petition for rehearing of defendants' petition to vacate and set aside interlocutory decree, and permit defendants to file an amended answer and strike out answers to interrogatories propounded by plaintiff, etc., upon George E. Harpham, a solicitor and counsel for defendants Samson and Fitzgerald in the above-entitled cause, at his office in the Byrne Building, Los Angeles, California, by exhibiting said petition for rehearing, etc., to a person at said office and representing said counsel Harpham, or in charge of said office, and handing to said last

named person a true and exact copy of said petition for rehearing, etc.; that counsel Harpham himself was not to be found at his office for which reason said service was made upon the person representing himself to be in charge of said office.

ALAN FRANKLIN.

Subscribed and sworn to before me this 15th day of February, 1923.

Subscribed and sworn to before me this 15th day of Feb. 1923.

[Seal] J. CALVIN BROWN,

Notary Public in and for the County of Los Angeles, State of California.

My commission expires Sept. 27, 1925. [35]

[Endorsed]: In Equity—No. F—89. In The United States District Court, Southern District of California, Southern Division. Charles Henry Pray, Plaintiff, vs. W. B. Copes, et al., Defendants. Petition for rehearing, notice and order. Received copy of the within papers this 13th day of Feb., 1923. Douglas L. Edmonds, Attorneys for Defendants, Copes and Hill. Filed Feb. 15, 1923. Chas. N. Williams, Clerk. By W. J. Tufts. Raymond Ives Blakeslee, 727–30 California Building, Los Angeles, Cal., and J. Calvin Brown, Solicitors for Plaintiff. (E). [36]

At a stated term, to wit: the January, A. D. 1923, term of the District Court of the United States of America, within and for the Southern Division of the Southern District of California, held at the courtroom thereof, in the city of Los Angeles, on Monday, the nineteenth day of February, in the year of our Lord one thousand nine hundred and twenty-three. Present: the Honorable BENJAMIN F. BLEDSOE, District Judge.

No. F.-89—EQUITY.

CHARLES HENRY PRAY,

Plaintiff,

vs.

W. B. COPES et al.,

Defendants.

MINUTES OF COURT—FEBRUARY 19, 1923—ORDER DENYING MOTION.

This cause coming on at this time for hearing on complainant's petition for rehearing of defendants' petition to vacate and set aside interlocutory decree and permit defendants to file an amended answer and strike out answers to interrogatories, etc. Attorney Brown of Messrs. Blakeslee & Brown, appearing as counsel for the plaintiff and Geo. E. Harpham, Esq., appearing as counsel for Samson & Fitzgerald and Attorney Douglas L. Edmonds appearing as counsel for Copes & Hill and said Attorney Brown having argued in support of said

motion and Geo. E. Harpham, Esq., having argued in reply, it is by the Court ordered that said motion be denied. [37]

In the District Court of the United States in and for the Southern District of California, Southern Division.

CHARLES HENRY PRAY,

Complainant,

vs.

W. B. COPES et al.,

Defendants.

AMENDED ANSWER.

Now come the defendants M. J. Fitzgerald and W. A. Samson doing business under the fictitious name of National Fire Escape Ladder Company, and for themselves alone, and not for their codefendants, or either or any of them, in answer to the bill of equity for accounting and an injunction filed by complainant herein against these defendants and others, admit, allege and deny as follows:

I.

Deny that on the 15th day of June, 1920, or at any other time, or at all, complainant was the original or first inventor of a certain new or useful invention entitled "Fire Escape" more particularly described in the complainant's bill of equity on file herein.

II.

Deny that the same was a new or useful inven-

tion not known or used by others in this country before the invention thereof by your complainant, and deny that at the time of the application for patent therefor, as hereinafter alleged, the same had not been in public use, or on sale, in the United States for more than two years prior thereto, or that it had not been abandoned.

III.

Defendants have not sufficient information or belief [38] to enable them to answer the allegations of paragraph IV of complainant's bill of equity, and on that ground deny that said letters patent were issued in due form of law under the seal of the Patent Office of the United States, signed by the Acting Commissioner of Patents or prior to the issuance thereof all proceedings were had or taken which were required by law to be had or taken to the issuance of letters patent for new or useful inventions, or at all.

IV.

These defendants have not sufficient information or belief to enable them to answer the allegations of paragraph V of complainant's bill in equity, and basing their denial upon that ground, these defendants deny that since the issuance of said letters patent, or at all, complainant has been and is now the sole owner and holder thereof; deny that said complainant has practiced the invention described in said bill and deny that complainant has used large or any numbers of said fire escapes, and deny that any notice was given to the public at large that said device was covered by said or any letters patent.

V.

Deny that within one year last past, in the Southern District of California, Southern Division, or at all, these defendants have jointly manufactured, used and sold or jointly manufactured or used or sold large or any number of fire escapes containing or embracing the invention described or patented in or by said letters patent or the claims thereof, and deny that they have infringed upon the alleged exclusive rights secured by complainant by said claims; deny that complainant has requested defendants to cease or desist from infringing upon said letters patent; deny that defendants are still manufacturing, using and selling, or manufacturing, or using or selling said patented invention, and deny that they threaten to so manufacture, use and sell or manufacture or use or sell them, and deny that unless [39] restrained by the Court they will continue to so manufacture or use or sell them.

VI.

That all fire escape ladders made or sold by these defendants, or either of them, have been manufactured substantially in accordance with the device described in U. S. letters patent No. 1,140,708, issued to Julius Pauly May 25, 1915, which said patent is now owned by these defendants.

VII.

That a fire escape ladder embodying the alleged invention of the complainant herein has been on sale by the F. P. Smith Wire and Iron Works of Chicago, Illinois, for twenty-five years last past

and is illustrated and partly described on page 37 in the catalogue of said iron works, published at Chicago, Illinois, in the year 1915, which catalogue, as these defendants are informed and believe and therefore allege, had and has a large circulation in the United States ever since the year 1915, and was copyrighted in the year 1915 by F. P. Smith; that fire escape ladders embodying the alleged invention of the complainant herein have been in public use in and about the city of Chicago for the past twenty-five years, but the places where used and the persons by whom used are not known to these defendants, and they ask that when ascertained the same may be inserted in their answer by amendment.

VIII.

Further answering complainant's bill, these defendants deny that any fire escape ladder made or used or sold by them or either of them, is any infringement upon any rights belonging to the complainant, and deny that any acts of these defendants which they did not have a right to do, have caused complainant any loss or damage whatever.

IX.

Deny that complainant has suffered great and irreparable or great or irreparable injury and damage or injury or damage, [40] and deny that defendants have realized large profits and gains, or large profits or gains in the sum of $15,000, or any other sum, or at all.

WHEREFORE, these defendants pray that the complainant's bill be dismissed, that they may have

judgment for their costs and for such other and further relief as may be agreeable to equity.

G. E. HARPHAM,
Attorney for Said Defendants.

United States of America,
Southern District of California,—ss.

W. A. Samson, being first duly sworn, deposes and says: that he is one of the defendants in the within action; that he has read the above and foregoing answer, and knows the contents thereof; and that the same is true of his own knowledge, except as to those matters therein stated on his information or belief, and that as to those matters, he believes it to be true.

W. A. SAMSON.

Subscribed and sworn to before me this 24th day of February, 1923.

[Seal] J. L. MURPHEY,
Notary Public in and for the County of Los Angeles, State of California.

[Endorsed]: F.–89—Equity. U. S. District Court, Southern District of California, Southern Division. C. H. Pray, Plaintiff, vs. W. B. Copes et al., Defendants. Amended Answer of Samson and Fitzgerald. Received Copy of the Within Amended Answer This 26th Day of February, 1923. Reserving an Objection. Raymond Ives Blakeslee, J. Calvin Brown, Attorneys for Plaintiff. Filed Feb. 26, 1923. Chas. N. Williams, Clerk. By W. J. Tufts, G. E. Harpham, 338 Byrne Bldg., Attorney for Samson & Fitzgerald. [41]

In the District Court of the United States in and for the Southern District of California, Southern Division.

CHARLES HENRY PRAY,

Complainant,

vs.

W. B. COPES et al.,

Defendants.

ANSWER.

Now come the defendants W. B. Copes and J. E. Hill, copartners doing business under the fictitious name of Triangle Iron Works, and for themselves alone and not for their codefendants, or either of them, in answer to the bill of equity for accounting and injunction filed by complainant herein against these defendants and others, admit, allege and deny as follows:

I.

Deny that on the 15th day of June, 1920, or at any other time, or at all, complainant was the original or first inventor of a certain new or useful invention entitled "Fire Escapes," more particularly described in the complainant's bill of equity on file herein.

II.

Deny that the same was a new or useful invention not known or used by others in this country before the invention thereof by your complainant, and deny that at the time of the application for patent

therefor, as hereinafter alleged, the same had not been in public use, or on sale, in the United States for more than two years prior thereto, or that it had not been abandoned.

III.

Defendants have not sufficient information or belief to enable them to answer the allegations of paragraph IV of [42] complainant's bill of equity, and on that ground deny that said letters of patent were issued in due form of law under the seal of the Patent Office of the United States, signed by the Acting Commissioner of Patents or prior to the issuance thereof all proceedings were had or taken which were required by law to be had or taken prior to the issuance of letters patent for new or useful inventions, or at all.

IV.

These defendants have not sufficient information or belief to enable them to answer the allegations of Paragraph V of complainant's bill in equity, and basing their denial upon that ground, these defendants deny that since the issuance of said letters patent, or at all, complainant has been and is now the sole owner and holder thereof; deny that said complainant has practiced the invention described in said bill and deny that complainant has used large or any numbers of said fire escapes, and deny that any notice was given to the public at large that said device was covered by said or any letters patent.

V.

Deny that within one year last past, in the South-

ern District of California, Southern Division, or at all, these defendants have jointly manufactured, used and sold or jointly manufactured or used or sold large or any numbers of fire escapes containing or embracing the invention described or patented in or by said letters patent or the claims thereof, and deny that they have infringed upon the alleged exclusive rights secured by complainant by said claims; deny that complainant has requested defendants to cease or desist from infringing upon said letters patent; deny that defendants are still manufacturing, using and selling, or manufacturing or using or selling said patented invention, and deny that they threaten to so manufacture, use and sell or manufacture or use or sell them, and deny that unless restrained by the Court they will continue to so manufacture or [43] use or sell them.

VI.

That all fire escape ladders made or sold by these defendants, or either of them, have been manufactured substantially in accordance with the device described in U. S. letters patent No. 1,140,798 issued to Julius Pauly, May 25, 1915, which said patent is now owned by these defendants.

VII

That a fire escape ladder embodying the alleged invention of the complainant herein has been on sale by the F. P. Smith Wire and Iron Works of Chicago, Illinois, for twenty-five years last past and is illustrated and partly described on page 37 in the catalogue of said iron works, published at Chicago, Illinois, in the year 1915, which cataloguss

as these defendants are informed and believe and therefore allege, had and has a large circulation in the United States ever since the year 1915, and was copyrighted in the year 1915 by F. P. Smith; that fire escape ladders embodying the alleged invention of the complainant herein have been in public use in and about the City of Chicago for the past twenty-five years, but the places where used and the persons by whom used are not known to these defendants, and they ask that when ascertained the same may be inserted in their answer by amendment.

VIII.

Further answering complainant's bill, these defendants deny that any fire escape ladder made or used or sold by them or either of them, is any infringement upon any rights belonging to the complainant, and deny that any acts of these defendants which they did not have a right to do, have caused complainant any loss or damage whatever.

IX.

Deny that complainant has suffered great and irreparable or great or irreparable injury and damage or injury or damage, and deny that defendants have realized large profits and gains, [44] or large profits or gains in the sum of $15,000, or any other sum, or at all.

WHEREFORE, these defendants pray that the complainant's bill be dismissed, that they may have judgment for their costs and for such other and further relief as may be agreeable to equity.

DOUGLAS L. EDMONDS,
Attorney for Said Defendants.

United States of America,
Southern District of California,
County of Los Angeles.

W. B. Copes, being first duly sworn, deposes and says: that he is one of the defendants in the within action; that he has read the above and foregoing answer, and knows the contents thereof; and that the same is true of his own knowledge, except as to those matters therein stated on his information or belief, and that as to those matters, he believes it to be true.

W. B. COPES.

Subscribed and sworn to before me this 23d day of February, 1923.

[Seal] DOUGLAS L. EDMONDS,
Notary Public in and for the County of Los Angeles, State of California.

[Endorsed]: F.–89–Equity. In the District Court of the United States, Southern District of California, Southern Division. Charles H. Pray, Complainant, vs. W. B. Copes, et al., Defendants. Answer of Defendants Copes and Hill. Received Copy of the Within Answer This 24th Day of February, 1923. Raymond Ives Blakeslee, J. Calvin Brown, Solicitors for Complainant. Filed Feb. 26, 1923. Chas. N. Williams, Clerk. By W. J. Tufts, Douglas L. Edmonds, Los Angeles, Cal. Telephones 60580 Main 1963, 1114 Stock Exchange Bldg. Attorney for Defendants Copes and Hill. [45]

In the District Court of the United States, for the Southern District of California, Southern Division.

Hon. BENJAMIN F. BLEDSOE, Judge Presiding.

No. F.-89—IN EQUITY.

CHARLES HENRY PRAY,

Complainant,

vs.

W. B. COPES et al.,

Defendants.

TESTIMONY AND PROCEEDINGS ON TRIAL AND REHEARING.

Filed Aug. 27, 1923. Chas. N. Williams, Clerk. By Edmund L. Smith, Deputy Clerk.

Los Angeles, California, July 18, 1922.

Los Angeles, California, July 12, 1923.

JOHN P. DOYLE, Shorthand reporter and notary, Suite 507 Bankitaly International Building, Los Angeles, California, Main 2896. [46]

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[47]

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Defendants.

TESTIMONY AND PROCEEDINGS, ON TRIAL AND REHEARING.

APPEARANCES:

For Complainant:

R. I. BLAKESLEE, Esq., and J. CALVIN BROWN, Esq.

For Defendant:

VICTOR H. KOENIG, Esq. (304 Union Oil Building).

Los Angeles, California, July 18, 1922. [48]

Los Angeles, California, Tuesday, July 18, 1922.

10 A. M.

The COURT.—Pray versus Copes.

Mr. BROWN.—Ready.

The COURT.—Proceed.

Mr. BROWN.—If your Honor please, this is an ordinary suit in equity involving the infringement

of a patent. I have here a copy of the patent in suit that was granted to Mr. Pray, and I would like to explain or to read it to your Honor if you care to follow the drawing.

The COURT.—I will read it first and then you may make any explanation you desire to make. (Examining patent.) All right.

Mr. BROWN.—Your Honor will see that the patent covers a structure having a second and third floor platform with a permanent connecting ladder there between and a slidable ladder with a counterbalance weight whereby the ladder may be moved upwardly or downwardly with a latch means at the second floor platform for holding the movable ladder in place until it is desired to use the same. Our case is based upon the patent and on the answers to plaintiff's interrogatories given by defendants.

Mr. KOENIG.—In the claims marked Nos. 2, 3 and 4 of the Pray patent the blue-print attached to the interrogatories of the plaintiff shows marked differences. As to No. 1, under Section 4920 of the Revised Statutes you have to give 30 days' notice to the plaintiff of certain defenses, and we were to put in the defense of our device having been in use for more than two years, but from the time of the setting of the case to the time of the trial was less than 30 days so that we couldn't do that. Does your Honor wish me to call attention to the differences in the construction of the ladders as shown by the blue-print and the Pray patent? [49]

The COURT.—Yes, if that has anything to do with the case.

Mr. KOENIG.—Yes. Now taking the Pray patent there, the first thing, the slidable ladder is inside of a stationary ladder; in the blue-print of the ladder used by the defendant the slidable ladder is on the outside, and the sheaves or walls in which the weight or counterbalance is attached for the balancing of the slidable ladder are attached to the platform and run on separate cables in the Pray patent while under our patent they are attached to the permanent or stationary ladder and run in the grooves of that ladder. Now these brackets that hold the stationary and slidable ladders together are attached to the permanent or stationary ladder in the Pray patent on the blue-print, while in our ladder they are shown to be attached to the slidable ladder and to move along the slidable ladder. The Pray patent shows the ladder to proceed through channel irons—

10, 11, 12 and 13—and no channel irons are used on the blue-print shown as used by the defendants. Now the blue-print will show, on the ladder used by the defendants, that the stationary ladder extends considerably below the second floor platform and the slidable ladder moves along that. The Pray ladder is between the second and third floor platforms only. The ladder as shown in the Pray patent is attached to an inside balcony between the second and third floor platforms through holes cut in the platform; the ladder used by the defendants is attached on the outside and moves up and down on the outside of the platform. If your Honor will notice the stop lever in the two patents, there is no resemblance between them at all.

The COURT.—What do you mean by no resemblance?

Mr. KOENIG.—The stop in the blue-print ladder is just an iron vertical bar and in the Pray patent it is a plug moving back and forth. 15 is the stop. The stop in the blue-print is just a vertical bar. We are operating under a patent given to one of the defendants on that bar. [50]

The COURT.—Those all seem to me to be substantial equivalents.

Mr. KOENIG.—But, your Honor, we contend, and hope to prove by the evidence, that slidable ladders counterbalanced have been used for years by fire departments and by painters and decorators and all sorts of people.

The COURT.—All right. Go on.

Mr. KOENIG.—And the only thing they could get patented would be their separate device there as set forth in their claims Nos. 2, 3, and 4.

I have a patent for a ladder that is used here, a copy of a patent granted to Julius Pauly, that is more in line with the ladder used by the defendants than the ladder of Mr. Pray, the plaintiff.

Mr. Brown.—If your Honor please, to make out a *prima facie* case I wish to offer the original patent in evidence as Plaintiff's Exhibit No. 1; and I also wish to introduce in evidence the answers to the interrogatories filed by the defendants, both the first and second sets, and the interrogatories themselves. The first set contains a blue-print. We objected to certain points in the first set of answers to the interrogatories and subsequently a second set was

filed by the defendants, the first set containing the blue-print, which blue-print was furnished in answer to our request for a blue-print of the defendants' structure, and you will note by the interrogatories and their answers that all of the defendants are connected and associated together so that one representation of the blue-print will be sufficient for all. And, if your Honor please, there are no affirmative defenses, but just general denials, and the defendants have admitted infringements by the interrogatories and the answers thereto.

The COURT.—(Examining papers.) All right.

Mr. BROWN.—Plaintiff rests, your Honor. [51]

Mr. KOENIG.—We rest also, your Honor.

The COURT.—I don't see anything to do except to award a judgment for the plaintiff. They have a combination here that has been infringed, and while the various elements of it, many or perhaps all of them, have been in use for long periods of time, there is no evidence before the court that the combination has ever been in use. This thing of trying to differentiate between channel irons and angle irons might do for some things but not for a thing like this. Plaintiff will take a decree as prayed for.

(The hearing was thereupon adjourned.) [52]

In the District Court of the United States, for the Southern District of California, Southern Division.

Hon. BENJAMIN F. BLEDSOE, Judge Presiding.
No. F.-89—IN EQUITY.

CHARLES HENRY PRAY,

Complainant,

vs.

W. B. COPES et al.,

Defendants.

TESTIMONY AND PROCEEDINGS ON REHEARING.

APPEARANCES.

For Complainant: R. I. BLAKESLEE, Esq., and J. CALVIN BROWN, Esq.

For Defendants Samson and Fitzgerald: GEORGE E. HARPHAM, Esq.

For Defendants Copes and Hill: DOUGLAS L. EDMONDS, Esq. [53]

Los Angeles, California, Thursday, July 12, 1923, 10 A. M.

The COURT.—Pray against Copes.

Mr. BROWN.—Ready for the plaintiff.

Mr. EDMONDS.—Ready for the defendants.

Mr. BROWN.—If the Court please, this matter comes on for rehearing and involves patent No. 1,343,642, being a patent granted to C. H. Pray

for fire escapes. I would like to ask the court at this time that the proofs, proceedings, interrogatories propounded by the plaintiff and interrogatory answers upon the granting of the rehearing, as well as the exhibits, stand as part of the proofs in this present case and that the court enter an order on the record to that effect. It will save reintroducing them. The patent in suit, of which that is Exhibit 1, as the Court will recall, involves a structure having a first and second balcony with a permanent ladder there between and a movable ladder slidable upon a permanent ladder, there being counterbalance means for supporting the movable ladder in elevated or lowered position, as shown for instance in Fig. 1 in elevated position, and locked when in such position by a suitable lock, such as is shown in Fig. 6 of the drawing. The lock comprises an arm with a slidable member 15 adapted to engage one of the legs of the movable ladder D, a movement of the lever to the left of the showing in Fig. 6 permitting the ladder to move upon giving the same a slight push so that it may have momentum. This movement pulls upon the counterbalance weight which is associated with a cable 23, passing over suitable sheaves 26 and 27 on the second balcony B.

The claims, of which there are four, all relate to a fixed ladder incorporated with a movable ladder and counterbalance means connected to the ground ladder and manually [54] operated means normally supporting the ground ladder in elevated position. The elements of claim 1 appear in the re-

maining three claims, and it is the combination that we are resting upon in this suit for infringement, that is, the fire escape having two platforms, a vertical ladder, a slidable ground ladder, the counterbalance means and the manually operated means for supporting the ground ladder. The manually operated means of the patent relate to the means for releasing the ladder D, which is a movable ladder, from its elevated position so that it may be moved, that being the slide 15 of Fig. 6 as well as the arm 19 for permitting the slide to move. We rely upon the combinations of said claim. That, in substance, is our case and we contend that the defendants, and each of same, have infringed this structure and the claims of this patent in suit.

Mr. HARPHAM.—If your Honor please, we rely solely upon the ground that the ladders constructed by the defendants are not infringements. As counsel for plaintiff has stated, the patent is for a combination of elements. Your Honor is well conversant with the law of patents that when any single element of a combination is omitted and no substitute introduced therefor the structure omitting such element is not an infringement of the letters patent. But there is one element that counsel left out of his combination which is provided for in the claims, which is means for retaining said ground ladder in close sliding engagement with the stationary ladder. That is one of the elements of the claims and in the defendants' structure the stationary ladder does not form any sup-

porting means for the sliding ladder nor are the two ladders in close sliding engagement nor is there any means for retaining the ground ladder in sliding engagement with the stationary ladder.

Mr. BROWN.—A stipulation was entered into, if the Court please, by and between counsels for the defendants Copes and Hill and Samson and Fitzgerald with the plaintiff, which is now on file, and which I desire to read to the Court: [55]

It is hereby stipulated by solicitors and counsel for plaintiff and defendants Fitzgerald and Samson that the annexed photographs are true, accurate and correct representations of what is therein purported to be shown, to wit, portions of the building of the Los Angeles Times at First Street and Broadway, Los Angeles, California, together with fire escape structures installed upon or in connection with said building, and that the ladder devices so installed and correctly shown in said photographs were sold and furnished to said Los Angeles Times and installed upon *its* said building by defendants M. J. Fitzgerald and W. A. Samson on or about the 24th day of January, 1922 (which date, as the Court will notice, is after the date of the patent), and paid for by the Times-Mirror Company on behalf of said Los Angeles Times February 15, 1922, in accordance with a bill or invoice, a true copy of which is attached hereto, and that said photographs and said copy of bill or invoice may be introduced into evidence on the retrial or rehearing of this cause without further proofs, and that all objections thereto as to competency or any objection

other than materiality or relevancy is and are specifically hereby waived by said defendants Fitzgerald and Samson; such attached photographs and copy to be receivable in evidence with the same force and effect as if proven.

And it is hereby separately stipulated by and between plaintiff and defendants J. E. Hill and W. B. Copes that the fire escape ladder devices hereinabove referred to and installed on said Los Angeles Times Building were manufactured by said defendants Copes and Hill at the order of said defendants Samson and Fitzgerald.

The structure of the photographs shows what we contend is a fixed ladder and a movable ladder slidable thereon with the counterbalance means for raising or lowering the movable [56] ladder as well as the locking means at the first or second balcony for holding the movable ladder in elevated position. I will ask at this time that the photographs be introduced into evidence as our exhibits, Exhibits 2 and 3 I believe, in accordance with the stipulation, and that the bill, the original of which is here on file, be introduced as Plaintiff's Exhibit 4. Mr. Robinson, will you please take the stand?

TESTIMONY OF ROBERT R. ROBINSON, FOR PLAINTIFF.

ROBERT R. ROBINSON, called as a witness on behalf of the plaintiff, having been first duly sworn, testified as follows:

Direct Examination.

(By Mr. BROWN.)

Q. (By The CLERK.) State your name, please.

(Testimony of Robert R. Robinson.)

A. Robert R. Robinson.

Q. (By Mr. BROWN.) Where do you reside, Mr. Robinson?

A. 1610 North Coronado Street, Los Angeles.

Q. What is your occupation?

A. Mechanical engineer and designing structures.

Q. Are you a graduate engineer? A. Yes, sir.

Q. Of what university?

A. Washington University, St. Louis.

Q. Are you familiar with general mechanical structures? A. Yes, sir.

Q. Such as ladders? A. Yes, sir.

Q. Have you viewed the Times Building and any ladders installed upon such building on the outside thereof? A. Yes, sir.

Q. When did you view them?

A. Yesterday evening and this morning.

Q. I show you what purports to be photographs of the installation of ladders on the Times Building and will ask if you viewed such ladders.

A. Yes, sir.

Q. I will ask also which is the movable ladder, if any? [57]

A. This ladder on the outside here.

Q. How is that marked?

A. The rungs are marked with a capital A.

Q. Is there any other ladder structure there?

A. Yes, the ladder structure shown at B.

Q. Where is that ladder structure attached to the building?

A. It is attached to the building below the third

(Testimony of Robert R. Robinson.)

story balcony and to the second story balcony and below the second story balcony.

Q. Did you observe whether or not the first ladder, the rungs of which are marked A, is slidable upon the second ladder marked B?

A. It is slidable upon the second ladder marked B.

Q. I will ask you to refer to the second photograph. Did you see the ladder in lowered position, the movable ladder? A. I did not.

Q. Mr. Robinson, how would you define a ladder? What is a ladder?

A. A ladder consists of steps or rungs mounted between two vertical supports. May I refer to a definition I have?

Q. State to the Court to what you are referring.

The COURT.—Surely everybody who has ever been outside of the house knows what a ladder is. Don't they?

Mr. HARPHAM.—The Court will take judicial notice of what a ladder is, certainly.

The COURT.—There is no need of offering any evidence as to that.

Q. (By Mr. BROWN.) Then, Mr. Robinson, would you say the device marked B was or was not a ladder?

A. I would say that it was a ladder.

Mr. BROWN.—That is all. [58]

Cross-examination.

Q. (By Mr. HARPHAM.) You would say that

(Testimony of Robert R. Robinson.)

it was a ladder from what portion of the ladder to what portion?

A. There are two portions of the ladder, or of the structure B, which I would say was a ladder. One portion extends below the balcony on the second floor and that consists of rungs spaced approximately the same distance as the rungs on the ladder A, which is the movable ladder. Then there is an additional portion of the ladder B above the top of ladder A when it is in its locked position above the sidewalk which I would say was a ladder, consisting of rungs of slightly greater spacing which would make it so that it could be used as a ladder above the top of ladder A.

Q. Are you familiar with fire escape structures?

A. I have seen them several times and examined them.

Q. You notice on that photograph another structure marked D, do you not? A. Yes, sir.

Q. What is that? A. That is a ladder.

Q. What is the purpose of that ladder marked D on the Times Building?

A. It is to go from the balcony on the second story to the balcony on the third story.

Q. Did you notice the balcony on the third story when you were examining the ladder? A. Yes.

Q. Is there any means to go from that balcony to the ladder marked D? A. Yes, sir.

Q. Is there any means on that balcony to go from that balcony to the structure that you term the ladder B?

(Testimony of Robert R. Robinson.)

A. The same means that there is to go from the second story to the ladder marked D, by stepping over the railing.

Q. You would have to step over the railing, would you not? [59]

A. You would have to do that on the second floor.

Q. You would have to step over it on the second?

A. Yes.

Q. You don't have to step over the railing to go to the ladder marked D, do you?

A. No, you do not.

Q. From your knowledge of fire escape structures is not the ladder marked D what is known as the stationary ladder which is designed for descent from the third balcony to the second balcony?

A. I would say so, yes.

Q. From your examination of the structures which you term ladders A and B is not the structure which you term ladder B designed primarily for the guidance of the ladder marked A in its movement up and down?

A. Yes, I would say so but I don't really see the use of the portion above the point above ladder A for that purpose.

Q. Isn't it there for the purpose of guiding the upper portion of the ladder A when it is in elevated position?

A. Yes, but it doesn't extend up as far as the second balcony. Therefore, what is the use of the upper portion of the two rungs?

(Testimony of Robert R. Robinson.)

Q. How many rungs are there in the structure as you examined it on the Times Building between the second and third balconies in the structure which you call ladder B? How many rungs are there?

A. There are two rungs I believe above the topmost portion of ladder A and one rung at least between that portion of the ladder and the railing of the balcony.

Q. (By the COURT.) Which balcony?

A. The railing of the balcony on the second floor.

Q. (By Mr. HARPHAM.) Would it be possible for a man to go up and down on those rungs from the second balcony to the third balcony or from the third balcony to the second?

A. It would be very easy to go down. [60]

Q. (By The COURT.) You could go down without any rungs at all or any structure?

A. Well, the rungs would serve as handholds to assist in going down. You couldn't very well hold on to a straight angle iron in going down.

Q. (By Mr. HARPHAM.) Have you examined the patent sued on in this action?

A. I have not.

Q. Let me ask you: would you consider these structures within the term ladders A and B to answer to this phraseology, a "ground ladder slidable on the permanent ladder and latched in normal elevated position with the rungs of both ladders horizontally aligned and positioned in close proximity to each other to form relatively wide steps"?

(Testimony of Robert R. Robinson.)

Would you consider the two structures to answer to that?

A. Yes, I would say that it does in its uppermost position on account of the fact that should something go wrong with the pulleys ladder B could be used to adjust the pulleys when the ladder A is in its locked position, or to put the rope on the pulleys.

Q. Do the rungs of the two ladders A and B between the balconies form aligned relatively wide steps?

A. I do not quite understand that. I wouldn't know exactly how to interpret that.

Q. You would understand what a wide step was, wouldn't you, the step of ladder A in proximity with the step of ladder B to form a relatively wide step?

A. No, I wouldn't say that they did that because they are slightly spaced relative to each other.

Q. You say that those rungs of ladder B are staggered with relation to the rungs of ladder A?

A. Yes, they are below the balcony of the second story.

Q. And also between the balcony of the second and third stories they are staggered, are they not, in relation to each other, between the two balconies, the second and third stories? [61]

A. I couldn't say about that.

Q. You can see from the picture, can you not?

A. The rungs on the ladder B are above the rungs on the ladder A between the second and third balconies.

(Testimony of Robert R. Robinson.)

Q. And they are in staggered relation, are they not?

A. No. They are entirely above. There are no rungs of ladder A above the bottom rung of ladder B as far as I can see with the exception of the rung which is down below and which I cannot tell just exactly where it is from the photograph.

Q. But those rungs are not wide, that is, they don't form wide steps, do they?

A. No, they do not.

Mr. HARPHAM.—That is all.

Redirect Examination.

(By Mr. BROWN.)

Q. Mr. Robinson, approximately how many, if any, rungs does it take to make a ladder? One or two or three or how many?

A. I would say one rung would make a ladder.

Q. Would not the staggering of the rungs between the ladder B and the one having the rungs marked A depend upon the relative position of the two ladders? A. Yes, it would.

Q. And if two of the rungs were in alignment would the step, or would it not, be relatively wide?

A. The step would be relatively wide, yes, if they could be put down so they could be in line.

Mr. BROWN.—That is all.

Q. (By The COURT.) I see one of the rungs on this stationary structure B but I don't see the other one. I see one of the rungs right at the top of the window. Where is the other one? Where does it come? [62]

(Testimony of Robert R. Robinson.)

Q. (By Mr. BROWN.) Please explain that to the Court.

A. There is one rung right across or above that shield-shaped structure. It runs right across that.

Q. (By The COURT.) Above what?

A. On the shield-shaped structure above the window.

Q. I see the one right below the coping over the window. Where is the other one?

A. It is slightly above that in the photograph between the lines of the bottom of the balcony on the third floor and the top of the window. It goes right across that shield ornament situated in between there.

Q. (By Mr. HARPHAM.) Isn't that the bottom of the sliding weight and not a rung?

A. No. The sliding weight is down here shown at E. There is a rung just—

Q. (By The COURT.) Right across the center of that shield? A. Yes.

Q. Yes, I see; it looks like it might be and covered by the weight when the weight is up apparently.

A. Well, the weight could go considerably above that.

Q. There are two of those in there. Now what is the distance between that upper balcony and the lower balcony?

A. I couldn't say exactly but I would say about 12 to 14 feet.

Q. 12 to 14 feet? A. Yes.

(Testimony of Robert R. Robinson.)

Q. Do you think any individual, the stairway D being there, would be tempted in order to escape a fire to climb down that structure?

A. No, I do not. For instance, if the rope should get stuck in the pulley he would have to climb up there when it is in locked position to loosen the rope.

Q. Oh, yes, I suppose. That would be for purposes of repair? A. Yes.

Q. But for the ordinary use for which the instrumentality [63] is mounted you would never suspect anybody would try to escape a fire by coming down that structure, would you?

A. No, I would not.

Q. (By Mr. BROWN.) Mr. Robinson, what are the rungs A and upon which ladder are they mounted?

A. They are mounted upon the slidable ladder.

The COURT.—Which photograph are you looking at? Some of them are mounted on the stationary ladder.

Mr. BROWN.—I am referring to A, Mr. Robinson.

The COURT.—They are all marked A—well, not all of them.

Q. (By Mr. BROWN.) I am referring to the ladder B, Mr. Robinson. How many rungs are there, referring to the second photograph, on ladder B below the two that you have just mentioned, at the bottom of the ladder I am referring to?

A. There are five rungs below.

(Testimony of Robert R. Robinson.)

Q. And those are on the fixed ladder, are they?

A. On the fixed ladder. They are marked with the upper A in the second photograph.

Q. Then there are more than two rungs on the fixed ladder? A. Yes.

Q. In the 14 feet?

The COURT.—No, no.

Q. (By Mr. BROWN.) Well, in how many feet, Mr. Robinson?

The COURT.—The rungs he has just referred to are below the platform at the bottom of the second story.

Q. (By Mr. BROWN.) And extend up beside the platform, do they not?

A. And extend approximately up to the railing on the second balcony.

Q. Below the railing I meant to say of the platform. The two rungs you have been talking about are above the railing, between the railing and the platform of the story above? A. Yes.

Q. (By Mr. HARPHAM.) The photograph only shows one rung [64] marked A between the railing of the second balcony and the third balcony.

A. Refer to the first photograph.

Q. No; I mean the second one.

A. It is concealed in the second one owing to the fact that the weight is behind it and in the second photograph it shows it running across the shield.

Q. But it isn't marked A, is it, in the photograph?

A. No, it is not on this photograph. There is a rung there, though, because I noticed it in the structure that I examined down there.

Mr. BROWN.—Have you any further questions?

Mr. HARPHAM.—No further questions.

Mr. BROWN.—That is all. Did I understand the Court to enter the order permitting the exhibits in the former case to be included in this case?

The COURT.—I suppose so if there is no objection.

Mr. BROWN.—Is there any objection to the interrogatories propounded by us in the first case and your answers?

Mr. HARPHAM.—Your interrogatories and our last answers, or our amended answers to those interrogatories are all right, but not the original answers.

Mr. BROWN.—No, I understand that. The proofs, proceedings and interrogatories as well as the photographs under the stipulation and the bill, the original of which is on file, in the rehearing.

Mr. HARPHAM.—And all copies of patents that were offered in evidence or used.

Mr. BROWN.—Yes.

Mr. HARPHAM.—I don't see this patent to Pauly of May 25, 1915, No. 1,140,708.

Mr. BROWN.—I believe, if the Court please, that was mentioned first on the rehearing and not introduced into evidence. [65]

Mr. HARPHAM.—And likewise we don't find any title marking upon the Smith Catalog, which shows it was copyrighted in 1897, 1909, 1911, 1914 and 1915 by F. P. Smith. We desire only that portion of this catalog which is found on page 37.

Mr. BROWN.—We object to the introduction of the catalog into evidence on the ground that it hasn't been identified. There has been no foundation laid for its introduction. No deposition was taken as to the publication date. We cannot believe the title page nor can we refer to the page in view of the fact we don't know when it was published or where it came from. It should have been proved by deposition, if at all.

Mr. HARPHAM.—The paper itself shows what it is.

The COURT.—I don't understand that a printed catalog proves itself. If that were true all you would need to do would be to go out and print a catalog.

Mr. HARPHAM.—Well, that is true.

The CLERK.—Defendants' Exhibit "A."

Mr. BROWN.—It hasn't been introduced in evidence formally, has it?

Mr. HARPHAM.—We will withdraw it but it was used before.

The CLERK.—Pauly patent No. 1,140,708 is defendants' Exhibit "A."

Mr. BROWN.—We will object to the introduction of that except to show state of the prior art inasmuch as it is not a certified copy under the rule.

Mr. HARPHAM.—That is all it is offered for, is to show the state of the prior art.

The COURT.—It will be admitted for that purpose.

Mr. HARPHAM.—We have the original of the

(Testimony of Wilson B. Copes.)

Pauly patent. I didn't know that. Under the stipulation, though, copies may be referred to and used with the same force and effect as originals, if certified.

Mr. BROWN.—Well, to show the state of the prior art. [66]

Mr. HARPHAM.—That is all we want, is to show the state of the prior art.

Mr. BROWN.—Are you through?

Mr. HARPHAM.—Yes, is that all of the testimony?

Mr. BROWN.—Yes, sir. Is that all you have?

Mr. HARPHAM.—Yes.

Mr. BROWN.—In argument, if the Court please, with reference to the Pauly structure—

Mr. HARPHAM.—One minute, Mr. Brown, please. I guess maybe we better put our proof on. Mr. Copes, be sworn.

TESTIMONY OF WILSON B. COPES, FOR DEFENDANTS.

WILSON B. COPES, called as a witness on behalf of the defendants, having been first duly sworn, testified as follows:

Direct Examination.

(By Mr. HARPHAM.)

Q. (By the CLERK.) State your name, please.

A. Wilson B. Copes.

The COURT.—Does the plaintiff rest?

Mr. BROWN.—Yes, sir.

(Testimony of Wilson B. Copes.)

Q. (By Mr. HARPHAM.) Mr. Copes, what is your business?

A. Manufacturer of ornamental iron.

Q. How long have you been engaged in that business? A. Three years.

Q. Where? A. 1461 Griffith Avenue.

Q. In Los Angeles, California? A. Yes, sir.

Q. Have you ever manufactured any of these fire escape ladders? A. Yes, sir.

Q. What style of ladder have you manufactured?

A. It was known as the Samson-Fitzgerald ladder.

Q. Is the ladder that you have manufactured shown in that picture of the Times structure?

A. Yes, sir. [67]

Q. Have you ever manufactured any other style of ladder other than that?

A. No, only stairways.

Q. Referring to this photograph of the Times structure which has been introduced in evidence which is the permanent ladder which extends from the second to the third balconies?

A. The permanent ladder?

Q. Yes, sir. How is it marked in that photograph? A. It is marked D I would say.

Q. What is the purpose of this structure that is marked B in that photograph?

A. That is a guide frame for the sliding ladder A.

Q. Have you ever manufactured any fire escapes comprising "two relatively spaced stationary plat-

(Testimony of Wilson B. Copes.)

forms and an intermediate stationary vertical ladder, a slidable ground ladder, means for retaining said ground ladder in close sliding engagement with the stationary ladder, counter-balance means connected to the ground ladder and manually operated means normally supporting the ground *latter* in elevated position''? A. No, sir.

Q. In all the ladders which you have manufactured did the stationary ladder which extends from the second to the third balcony of the building constitute a guide for the sliding ground ladder?

A. No.

Q. Were they built in close proximity to each other? A. No, sir.

Q. When the sliding ladder and the stationary ladder between the second and third balconies were positioned were the rungs of the two ladders horizontally aligned and positioned in close proximity to each other to form relatively wide steps?

A. No, sir. There might have been a brace in there that accidentally might have been aligned to have made one step in the whole lay-out but they were not manufactured for that purpose. [68]

Q. And the structure you say marked B was simply a guide for the sliding ladder A?

A. Yes, sir.

Q. And not intended for use in ascending or descending from the second to the third balcony?

A. No, sir.

Q. These rungs that are marked there on the ladder as B, what is the purpose of those?

(Testimony of Wilson B. Copes.)

A. They were stiffeners for that frame.

Mr. HARPHAM.—That is all.

Cross-examination.

Q. (By Mr. BROWN.) What did you manufacture of the structures shown in the drawing?

A. A slidable ground ladder.

Q. And that is marked how?

A. That is marked A.

Q. And what else?

A. The frame that is marked B here to support the guides.

Q. And where did you place that frame?

A. That was placed from the second to the third floor.

Q. And its purpose was what?

A. For a guide for the sliding ladder A.

Q. Are there any rungs on that frame between the second and third balconies?

A. Only such rungs, or you might call them rungs, as are put in there for braces.

Q. And the rungs at the bottom of the frame, what are they for, referring to the second photograph?

A. They were prepared to go from the bottom balcony down.

Q. Were they attached to the frame?

A. Yes, sir.

Q. What else did you manufacture of that structure? A. Well, the counter-balance.

Q. That includes the cable and the balance, does it? [69] A. Yes, sir.

(Testimony of Wilson B. Copes.)

Q. And do you have sheaves in the structure?

A. Yes, sir.

Q. Where are they?

A. They are at the top of the frame B.

Q. Did you hold the ladder in elevated position, the movable ladder?

A. Yes, sir, with a locking bar up in the center of the frame. It wasn't in the bottom of the groove.

Q. And it engaged the movable ladder, did it?

A. Yes, sir.

Q. And held it in elevated position?

A. Yes, sir.

Q. And did the movable ladder slide upon the frames or was it guided by the frames in its movement? A. There were clips on the frame.

Q. And it guided the movable ladder? A. Yes.

Mr. BROWN.—That is all.

Mr. HARPHAM.—Mr. Samson.

TESTIMONY OF WILLIAM A. SAMSON, FOR DEFENDANTS.

WILLIAM A. SAMSON, called as a witness on behalf of the defendants, having been first duly sworn, testified as follows:

Direct Examination.

(By Mr. HARPHAM.)

Q. (By The CLERK.) State your full name, please.

A. William Andrew Samson.

(Testimony of William A. Samson.)

Q. (By Mr. HARPHAM.) Mr. Samson, you are one of the defendants? A. I am, yes, sir.

Q. What is your business?

A. My business is the soliciting of fire escape ladders. Brokerage business.

Q. Have you ever sold or made or used any fire escape structures which had a second and third floor platform and a [70] permanent ladder extending from the one platform to the other?

A. I have, yes, sir. I have sold them. I never manufactured them but I have had them manufactured.

Q. Have you sold any counter-balance ground ladders that were slidable on the permanent ladder?

A. No, sir.

Q. Have you ever sold any fire escape structures in which there was a permanent ladder and a sliding ground ladder with the rungs of both ladders horizontally aligned and positioned in close proximity to each other to form relatively wide steps?

A. I did not.

Mr. HARPHAM.—Take the witness.

Mr. BROWN.—No cross.

Mr. HARPHAM.—That is all.

Mr. BROWN.—That is all.

(Argument to the Court.)

The COURT.—Mr. Brown, your patent requires an intermediate stationary and vertical ladder between the two spaced stationary platforms?

Mr. BROWN.—Yes, sir.

The COURT.—And that the movable ladder shall

slide upon and in close proximity with that intermediate stationary ladder?

Mr. BROWN.—Yes, sir.

The COURT.—Now where is that in the defendants' device?

Mr. BROWN.—In the defendants' device we contend that the ladder B is a stationary ladder.

The COURT.—But they don't use that to go from one platform to the other. It is not intended for that, obviously, and even a man at a fire couldn't use it.

Mr. BROWN.—That may be very true but what is B if it is not a ladder?

The COURT.—Why it is only a support, obviously.

Mr. BROWN.—And it has rungs in the support.

The COURT.—No, it hasn't rungs in the support. It [71] has iron bars to prevent distortion. That is all it is.

Mr. BROWN.—But our contention is—or how many rungs does it take to make a ladder?

The COURT.—That depends on how far you are going. If you had a hundred-foot ladder it would take more than otherwise but your patent calls for two platforms with a stationary ladder between them and a movable ladder operating upon the stationary ladder. That is your device. There isn't anything to compare with it in the defendants' device. If there is I would like to have you point it out.

Mr. BROWN.—Aren't we allowed a range of

equivalence, if the Court please? Is this patent not to be sustained simply because they don't run the rungs all the way up but set them a certain distance from the top?

The COURT.—If your patent calls for a contrivance that enables you to go from one story to the other and they don't use that and don't intend to use it, then they haven't copied your device. They have got a stairway of their own.

Mr. BROWN. Yes, but they didn't install it.

The COURT.—It doesn't make any difference, they have a stairway of their own there which is used to go from the second to the third story, and you have installed this stairway for them to go up.

(Further argument by Mr. Brown and citation of authorities.)

The COURT.—It is an essentially different structure and I don't see any infringement so the complaint will be dismissed and defendants' counsel will prepare a decree.

Mr. BROWN.—Note an exception, please. [72]

State of California,
County of Los Angeles,—ss.

John P. Doyle and Ross Reynolds, being first duly sworn, each for himself deposes and says that he was employed to report in shorthand and transcribe, and did so report and transcribe, the testimony and proceedings taken and had in the foregoing entitled cause, No. F.-89—Equity, on July 18, 1922 and July 12, 1923, comprising the sheets or pages thereof on which his name appears, and that

the foregoing is a full, true and correct transcript and statement of said testimony and proceedings, each of said deponents so stating with respect to the portion thereof reported and transcribed by him as aforesaid.

JOHN P. DOYLE.
ROSS REYNOLDS.

Subscribed and sworn to before me this 27th day of August, 1923.

[Seal] ERNEST E. CRIPPS,
Notary Public in and for County of Los Angeles, State of Calif. [72½]

In the United States District Court for the Southern District of California, Southern Division.

No. F.-89—EQUITY.

CHARLES H. PRAY,

Complainant,

vs.

W. B. COPES et al.,

Defendants.

FINAL DECREE DISMISSING BILL OF COMPLAINT.

BE IT REMEMBERED that the above-entitled cause came on regularly to be heard before the Court on July 12th, 1923, Hon. Benjamin F. Bledsoe, Judge.

The plaintiff was represented by J. Calvin Brown Esq., of the firm of Blakeslee & Brown.

The defendants W. B. Copes and J. E. Hill were represented by Douglas Edmonds, Esq., and the defendants W. A. Samson and M. J. Fitzgerald were represented by G. E. Harpham.

Testimony both oral and documentary was introduced by the respective parties and was considered by the Court.

Mr. Brown argued the case on behalf of the plaintiff. The Court did not desire argument from defendants and found that the fire escapes made and sold by the defendants were not an infringement on plaintiff's patent or of any of the claims thereof.

Wherefore by reason of the law and the premises the Court does now order, adjudge and decree that plaintiff's bill of complaint be and the same is hereby dismissed and it is further ordered that the defendants W. B. Copes and J. E. Hill recover their costs from plaintiff taxed at $27.20 and that the defendants W. A. Samson and M. J. Fitzgerald recover their costs from plaintiff taxed at $59.38.

Done in open court this 23 day of July 1923.

BENJAMIN F. BLEDSOE,
Judge.

Approved as to form pursuant to Rule 45.

BLAKESLEE & BROWN,
Attorneys for Plaintiff.

Per RAYMOND IVES BLAKESLEE. [73]

Decree entered and recorded Jul. 23, 1923.

CHAS. N. WILLIAMS,
Clerk.

By Edmund L. Smith,
Deputy Clerk.

[Endorsed]: No. F.–89–Equity. U. S. District Court, Southern District of California, Southern Division. Charles H. Pray, Plaintiff, vs. W. B. Copes et al., Defendants. Final Decree Dismissing Bill of Complaint. Douglas Edmonds, Attorney for Copes & Hill. G. E. Harpham, Attorney for Samson & Fitzgerald. Filed Jul. 23, 1923. Chas. N. Williams, Clerk. By Edmund L. Smith, Deputy Clerk. 12/256. [73½]

In the United States District Court for the Southern District of California, Southern Division.

No. F.–89—EQUITY.

CHARLES HENRY PRAY,

Complainant,

vs.

W. B. COPES et al.,

Defendants.

ASSIGNMENT OF ERRORS.

Comes now the complainant above named and specifies and assigns the following as the errors upon which he will rely upon his appeal to the United States Circuit Court of Appeals for the Ninth Circuit, from the final decree or order of this court filed July 23, 1923:

I.

That the District Court of the United States for the Ninth Circuit, Southern District of California, Southern Division, erred in entering any decree in favor of defendants.

II.

That said court erred in dismissing complainant's bill of complaint and in not sustaining it.

III.

That said court erred in allowing costs to defendants.

IV.

That said court erred in not entering a decree on behalf of complainant as prayed for.

V.

That said court erred in not finding and decreeing that complainant was entitled to an injunction as prayed for.

VI.

That said court erred in not finding and decreeing that complainant was entitled to damages and profits as prayed for. [74]

VII.

That said court erred in not finding and decreeing that complainant was entitled to costs as prayed for.

VIII.

That said court erred in not finding and decreeing that the letters patent sued on are unanticipated, valid and infringed.

IX.

That said court erred in not specifically finding, adjudging and decreeing that defendants and each of same have infringed the letters patent sued upon.

X.

That said court erred in setting aside the answers of defendants to interrogatories, filed July 13, 1922.

XI.

That said court erred in setting aside the decree made, entered and recorded the 18th day of July, 1922, adjudging and decreeing the patent in suit valid and infringed.

XII.

That said court erred in granting rehearing to defendants after making, entering and recording such decree of July 18, 1922, and particularly in view of the laches of defendants as to alleged new defenses.

XIII.

That said court erred in denying complainant's petition for rehearing on defendants' petition for rehearing, which petition was filed February 15, 1923.

XIV.

That said court erred in finding that there was no infringement of the patent sued on in memorandum of opinion filed January 26, 1923, granting said defendants' petition for rehearing and in so finding *non obstante veredicto* or prior to [75] such rehearing and the consideration of proofs thereon.

XV.

That the court erred in finding, adjudging and decreeing that a ladder device minus one or more rungs is not a ladder responsive to the terms of the claims of the patent sued on.

XVI.

That the court erred in not ordering, adjudging and decreeing that the structures of defendants

as depicted in Plaintiff's Exhibits 2 and 3 are infringements of claims of the patent sued on.

XVII.

That said court erred in not ordering and decreeing that defendants came before the trial court with unclean hands on rehearing.

XVIII.

That the court erred in not finding and decreeing that the letters patent sued on are for a basic and important, if not pioneer, invention, and entitled to a broad and liberal construction and to all of the presumptions of validity attaching to such letters patent.

XIX.

That said court erred in not finding that defendants have failed to make out any defense whatsoever to the bill of complaint of complainant.

XX.

In order that the foregoing assignment of errors may be made of record, the complainant presents the same to the court and petitions that disposition may be made thereof in accordance with the laws of the United States thereunto provided.

WHEREFORE, complainant prays that the said decree and order of this court, filed and entered on July 23, 1923, that [76] the bill of complaint herein be, and that said bill of complaint was, dismissed, with costs to defendants, be reversed, in part and in whole, and that the complainant be awarded the relief prayed for, and that the defendants be restrained from the infringement complained of in said bill of complaint and that an

accounting be ordered of profits and damages accruing or arising from the infringement complained of in said bill of complaint, with costs to complainant, and that the United States District Court for the Southern District of California, Southern Division, be directed to enter a decree, accordingly, and to set aside in entirety the order and decree of July 23, 1923, with costs to complainant.

Dated Los Angeles, Cal., Aug. 24, 1923.

Respectfully submitted,

RAYMOND IVES BLAKESLEE,

J. CALVIN BROWN,

Solicitors and Counsel for Complainant.

[Endorsed]: In Equity—No. F.–89. In the United States District Court, Southern District of California, Southern Division. Charles Henry Pray, Plaintiff, vs. W. B. Copes, et al., Defendants. Assignment of Errors. Filed Aug. 24, 1923. Chas. N. Williams, Clerk. By Edmund L. Smith, Deputy Clerk. Raymond Ives Blakeslee, J. Calvin Brown, 727–30 California Building, Los Angeles, Cal., Solicitors for Plaintiff. [77]

In the United States District Court for the Southern District of California, Southern Division.

No. F.–89—EQUITY.

CHARLES HENRY PRAY,

Complainant,

vs.

W. B. COPES et al.,

Defendants.

PETITION FOR ORDER ALLOWING APPEAL.

Charles Henry Pray, complainant in the above-entitled cause, conceiving himself aggrieved by the order and decree filed and entered on the 23d day of July, 1923, whereby it was ordered, adjudged and decreed that complainant's bill of complaint be and the same was dismissed with costs to defendants, now comes Raymond Ives Blakeslee, Esq., and J. Calvin Brown, Esq., solicitors for complainant and petition said court for an order allowing complainant, Charles H. Pray to prosecute an appeal from said final order and decree and the decision of the Court thereupon, and from the whole thereof, to the Honorable, The United States Circuit Court of Appeals for the Ninth Circuit, for the reasons specified in the assignment of errors which is filed herewith, under and according to the laws of the United States in that behalf made and provided; and also that an order be made fixing the amount of security which complainant shall give and furnish upon such appeal; and that a citation issue as provided by law, and that a certified transcript of the records, proceedings and papers upon which said decree was based be forthwith transmitted to the United States Circuit Court of Appeals for the Ninth Circuit, together with the exhibits on file in this case, in accordance with the rules in Equity promulgated by the Supreme Court

of the United States and the Statutes made and provided.

RAYMOND IVES BLAKESLEE,
J. CALVIN BROWN,
Solicitors and Counsel for Complainant.

Dated Los Angeles, Cal., August 24, 1923. [78]

[Endorsed]: No. F.–89—In Equity. In the United States District Court, Southern District of California, Southern Division. Charles Henry Pray, Plaintiff, vs. W. B. Copes, et al., Defendants. Petition for Order Allowing Appeal. Filed Aug. 24, 1923. Chas. N. Williams, Clerk. By Edmund L. Smith, Deputy Clerk. Raymond Ives Blakeslee, 727–30 California Building, Los Angeles, Cal., and J. Calvin Brown, Solicitors for Plaintiff. [79]

In the United States District Court for the Southern District of California, Southern Division.

No. F.–89—EQUITY.

CHARLES H. PRAY,

Complainant,

vs.

W. B. COPES et al.,

Defendants.

ORDER ALLOWING APPEAL.

In the above-entitled cause, the complainant having filed his petition for an order allowing an appeal from the order of this Court, made and entered July 23, 1923, together with assignment of

errors, now, upon motion of J. Calvin Brown, Esq., a solicitor for complainant,

IT IS ORDERED that said appeal be and hereby is allowed to complainant to the United States Circuit Court of Appeals for the Ninth Circuit, from the said order or decree made and entered by this court in this cause on July 23, 1923, that the bill of complaint of complainant herein be, and said bill of complaint of complainant was, dismissed, and further awarding costs to defendant, and that the amount of complainant's bond on said appeal be, and the same is hereby fixed at the sum of $250.00.

IT IS FURTHER ORDERED, that upon the filing of said security a certified transcript of the record and proceedings herein be forthwith transmitted to the said United States Circuit Court of Appeals for the Ninth Circuit, in accordance with the rules in Equity by the Supreme Court of the United States promulgated, and in accordance with the statutes made and provided, together with exhibits on file in this case, or duly certified copies thereof.

Dated Los Angeles, Cal., August 24, 1923.

WM. P. JAMES,
Judge. [80]

[Endorsed]: In Equity—No. F.-89. In the United States District Court, Southern District of California, Southern Division. Charles Henry Pray, Plaintiff, vs. W. B. Copes et al., Defendants. Order Allowing Appeal. Filed Aug. 24, 1923. Chas. N. Williams, Clerk. By Edmund L. Smith, Deputy Clerk. Raymond Ives Blakeslee, J. Calvin

Brown, 727–30 California Building, Los Angeles, Cal., Solicitors for Plaintiff. [81]

In the United States District Court, Southern District of California, Southern Division.

IN EQUITY—No. F.–89.

CHARLES HENRY PRAY,

Complainant,

vs.

W. B. COPES et al.,

Defendants.

BOND ON APPEAL.

KNOW ALL MEN BY THESE PRESENTS: That National Surety Company, a corporation organized and existing under the laws of the State of New York, and duly licensed to transact business in the State of California, is held and firmly bound unto W. B. Copes and J. E. Hill, doing business under the fictitious firm name of Triangle Iron Works, and M. J. Fitzgerald and W. A. Samson, doing business under the fictitious firm name of National Fire Escape Ladder Company, defendants in the above-entitled suit, in the penal sum of two hundred fifty dollars ($250.00) to be paid to said W. B. Copes, J. E. Hill, M. J. Fitzgerald and W. A. Samson, their successors and assigns, which payment well and truly to be made the National Surety Company binds itself, its successors and assigns, firmly by these presents.

Sealed with the corporate seal and dated this 25th day of August, 1923.

The condition of the above obligation is such that whereas the said complainant of the above-entitled suit, is to take an appeal to the United States Circuit Court of Appeals for the Ninth Circuit, to reverse an order or decree made, rendered and entered on the 23d day of July, 1923, by the District Court of the United States, for the Southern District of California, Southern Division, in the above-entitled cause, by which the bill of complaint was ordered, adjudged and [82] decreed to be dismissed, and was so dismissed, and in which costs were awarded to defendants.

NOW THEREFORE, the condition of the above obligation is such that if said Charles H. Pray shall prosecute his said appeal to effect and answer all damages and costs if he shall fail to make good his appeal, then this obligation shall be void; otherwise to remain in full force and effect.

IN WITNESS WHEREOF, the signature of said principal is hereunto affixed and the corporate name of said surety is hereunto affixed and attested by its duly authorized attorneys-in-fact, and the seal of said surety is hereunto affixed, at Los Angeles, California, this 25th day of August, 1923.

The first year's premium on this bond is $10.00.

NATIONAL SURETY COMPANY.

[Seal] By CATESBY C. THOM,
Attorney-in-fact.

CHARLES H. PRAY. (Seal)

State of California,
County of Los Angeles,—ss.

On this 25th day of Aug. in the year one thousand nine hundred and 23 before me, Nadine Girard, a notary public in and for said county and State, residing therein, duly commissioned and sworn, personally appeared Catesby C. Thom, known to me to be the duly authorized attorney-in-fact of National Surety Company, and the same person whose name is subscribed to the within instrument, as the attorney-in-fact of said company, and the said Catesby C. Thom acknowledged to me that he subscribed the name of National Surety Company thereto as principal, and his own name as attorney-in-fact.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

[Seal] NADINE GIRARD,
(Attorney-in-fact.)

Notary Public in and for Los Angeles County, State of California. [83]

Approved Aug. 25, 1923.

WM. P. JAMES,
District Judge.

Examined and recommended for approval as provided in Rule 29.

J. CALVIN BROWN,
Atty. for Plf. Appellant.

[Endorsed]: No. F.–89—In Equity. In the United States District Court, Southern District of

California, Southern Division. Charles H. Pray, Plaintiff, vs. W. B. Copes et al., Defendants. Bond on Appeal. Filed Aug. 24, 1923. Chas. N. Williams, Clerk. By Edmund L. Smith, Deputy Clerk. Raymond Ives Blakeslee, J. Calvin Brown, 727–30 California Building, Los Angeles, Cal., Solicitors for Plaintiff. [84]

In the United States District Court, Southern District of California, Southern Division.

IN EQUITY—No. F.–89.

CHARLES HENRY PRAY,

Plaintiff-Appellant,

vs.

W. B. COPES et al.,

Defendants-Appellees.

ORDER RE MODIFICATION OF STIPULATION RE TRANSCRIPT OF RECORD.

Sufficient cause hereunto appearing, it is hereby ORDERED:

That the stipulation as to transcript of record on appeal and exhibits in the above-entitled cause heretofore made on August 27, 1923, by and between the parties to the above-entitled cause, is hereby modified as to paragraph II thereof to read as follows, to wit:

That all the above papers and paper exhibits shall be forthwith transmitted to the Clerk of the United States Circuit Court of Appeals for the Ninth

Circuit, at San Francisco, California, at the expense of plaintiff, for use on said appeal and that the same shall be printed at the expense of the plaintiff and under the supervision of the Clerk of the Circuit Court of Appeals for the Ninth Circuit as provided in Rule 23.

Printed copies of the transcript shall be furnished to counsel, pursuant to the rules of said Circuit Court of Appeals for the Ninth Circuit.

BLEDSOE,
U. S. District Judge, So. Dist. Cal., So. Div. [85]

[Endorsed]: In Equity—No. F.–89. In the United States District Court, Southern District of California, Southern Division. Charles Henry Pray, Plaintiff-Appellant, vs. W. B. Copes et al., Defendants-Appellees. Order. Filed Jul. 2, 1924. Chas. N. Williams, Clerk. By R. S. Zimmerman, Deputy Clerk. Raymond Ives Blakeslee and J. Calvin Brown, 727–30 California Building, Los Angeles, Cal., Solicitors for Plaintiff-Appellant. [86]

Copy.

In the United States District Court, Southern District of California, Southern Division.

IN EQUITY—No. F.-89.

CHARLES HENRY PRAY,

Complainant,

vs.

W. B. COPES, and J. E. HILL, Doing Business Under the Fictitious Firm Name of TRIANGLE IRON WORKS, M. J. FITZGERALD and W. A. SAMSON, Doing Business Under the Fictitious Firm Name of NATIONAL FIRE ESCAPE LADDER COMPANY,

Defendants.

STIPULATION RE TRANSCRIPT OF RECORD.

Subject to the approval of the Court, which approval is hereby requested, all the parties to the above-entitled suit by their respective solicitors and counsel, stipulate and agree as follows:

I.

To save cost and expense, facilitate said appeal and present the issues as presented to this court, it is stipulated and agreed that the transcript of record on appeal in the above-entitled suit, shall consist of a true copy of each of the following papers in suit, to wit:

(a) A *verbatim* copy of all testimony and proceedings during the taking thereof taken and had

in open court as the same appears in the transcript thereof furnished by the stenographic reporter, including a copy of each and all exhibits;

(b) The bill of complaint herein;

(c) The answer herein filed February 27, 1922;

(d) Notice of motion and motion requiring defendants to answer certain interrogatories and for order striking out answer of defendants filed April 5, 1922;

(e) Order of Court dismissing plaintiff's motion to strike out answer of defendants—entered April 10, 1922; [87]

(f) Notice of motion and motion for an order compelling defendants to answer certain interrogatories—filed April 19, 1922;

(g) Interlocutory decree—entered July 18, 1922;

(h) Notice of motion and motion to vacate interlocutory decree and affidavit thereon—filed August 14, 1922;

(i) Motion to vacate interlocutory decree, motion taken under submission by order of court Sept. 25, 1922;

(j) Order setting aside interlocutory decree and permitting defendants to file amended answer upon payment of $200.00 as terms—entered January 26, 1923;

(k) Memorandum of opinion of the Court—filed January 26, 1923;

(l) Order vacating injunction and setting aside decree—filed February 5, 1923;

(m) Notice of petition and petition for rehearing defendants' petition to vacate, etc., interlocu-

tory decree and permitting defendants to file amended answer, etc.—filed February 15, 1923:

(n) Order of Court denying plaintiff's petition to rehear and to vacate order setting aside interlocutory decree and granting leave to file amended answer—entered February 19, 1923;

(o) Amended answer of defendants Copes and Hill—filed February 26, 1923;

(p) Amended answer of Samson and Fitzgerald —filed February 26, 1923;

(q) Final decree;

(r) Petition for order allowing appeal—filed August 24, 1923;

(s) Assignment of errors—filed August 24, 1923;

(t) Order allowing appeal—filed August 24, 1923;

(u) Citation to defendants issued August 25, 1923—filed August ——, 1923;

(v) Complainant's bond on appeal approved and filed August 25, 1923; and, [88]

(w) This stipulation.

II.

This being an appeal taken under the Act of February 13, 1911, it is further stipulated and agreed that an order be entered permitting complainant to withdraw all the above papers and paper exhibits upon giving the clerk of this court an identifying receipt therefor complainant hereby stipulating and agreeing to return each and all said papers and paper exhibits to the clerk of this court immediately after use of the same solely for the purpose of

producing and printing copies thereof for said Transcript of Record on Appeal.

Dated Los Angeles, Cal., August 27, 1923.

_____,

_____,

Solicitors for Complainant.

_____,

_____,

Solicitors for Defendants.

[Endorsed]: Chas. H. Pray vs. W. B. Copes et al. Stipulation. Filed August 28, 1923. Chas. N. Williams, Clerk. R. S. Zimmerman, Deputy. [89]

In the District Court of the United States, Southern District of California, Southern Division.

CHARLES HENRY PRAY,

Appellant,

vs.

W. B. COPES et al.,

Appellee.

CERTIFICATE OF CLERK U. S. DISTRICT COURT TO TRANSCRIPT OF RECORD.

I, Chas. N. Williams, Clerk of the United States District Court for the Southern District of California, do hereby certify the foregoing volume containing 90 pages, numbered from 1 to 90, inclusive, to be the transcript of record on appeal in the above-entitled cause, and that the same has been

compared and corrected by me and contains a full, true and correct copy of the *alias* citation bill in equity for accounting and injunction, answer of W. B. Copes and J. E. Hill, motion and notice thereof to strike out answer of defendants, order of April 10, 1922, denying motion to strike, motion and notice thereof to answer interrogatories, interlocutory decree, affidavit on motion to set aside decree, order permitting defendants to file amended answer, memorandum opinion, order setting aside interlocutory decree, notice and petition for rehearing, order denying petition for rehearing, amended answer of M. J. Fitzgerald and W. A. Samson, amended answer of W. B. Copes and J. E. Hill, reporter's transcript of testimony and proceedings on trial and rehearing, final decree dismissing bill of complaint, assignment of errors, petition for order allowing appeal, order allowing appeal, bond on appeal, order that papers and exhibits be transmitted to the clerk of the Circuit Court of Appeals, stipulation as to contents of record on appeal.

I DO FURTHER CERTIFY that the fees of the Clerk for comparing, correcting and certifying the foregoing Record on Appeal amount to $26.15, and that said amount has been paid me by the appellant herein.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of the District Court of the United States of America, in and for the Southern District of California, Southern Division, this 11th day of July, in the year of our Lord one thousand nine hundred and twenty-four,

and of our Independence the one hundred and forty-ninth.

[Seal] CHAS. N. WILLIAMS,
Clerk of the District Court of the United States of America, in and for the Southern District of California.

By R. S. Zimmerman,
Deputy.

[Endorsed]: No. 4285. United States Circuit Court of Appeals for the Ninth Circuit. Charles H. Pray, Appellant, vs. W. B. Copes and J. E. Hill, Doing Business Under the Fictitious Firm Name of Triangle Iron Works, and M. J. Fitzgerald and W. A. Samson, Doing Business Under the Fictitious Firm Name of National Fire Escape Ladder Company, Appellees. Transcript of Record. Upon Appeal from the United States District Court for the Southern District of California, Southern Division.

Filed July 15, 1924.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

In the United States Circuit Court of Appeals, Ninth Judicial Circuit.

IN EQUITY—No. F.–89.

CHARLES HENRY PRAY,

Appellant,

vs.

W. B. COPES et al.,

Appellee.

ORDER EXTENDING TIME TO AND INCLUDING JULY 15, 1924, TO FILE RECORD AND DOCKET CAUSE.

Good cause appearing therefor,

IT IS HEREBY ORDERED that the time heretofore allowed said appellant to docket said cause and file the record thereof with the Clerk of the United States Circuit Court of Appeals, for the Ninth Circuit, be, and the same is hereby enlarged and extended to and including the 15th day of July, 1924. And no further extensions will be granted.

BLEDSOE,

United States District Judge, Southern District of California.

[Endorsed]: In Equity—No. F.–89. in the United States Circuit Court of Appeals, Ninth Cir. Charles Henry Pray, Plaintiff, vs. W. B. Copes et al., Defendants. Order Extending Time to File Record July 15, 1924, etc. Filed Jun. 20, 1924. F. D. Monckton, Clerk.

In the United States Circuit Court of Appeals, Ninth Judicial Circuit.

IN EQUITY—No. F.-89.

CHARLES HENRY PRAY,

Appellant,

vs.

W. B. COPES et al.,

Appellees.

ORDER EXTENDING TIME TO AND INCLUDING JUNE 20, 1924, TO FILE RECORD AND DOCKET CAUSE.

Good cause appearing therefor,

IT IS HEREBY ORDERED that the time heretofore allowed said appellant to docket said cause and file the record thereof with the Clerk of the United States Circuit Court of Appeals, for the Ninth Circuit, be, and the same is hereby enlarged and extended to and including the 20th day of June, 1924.

Dated March 21, 1924.

WM. P. JAMES,
United States District Judge, Southern District of California.

[Endorsed]: In Equity—No. F.-89. In the United States Cir. Court of Appeals, Ninth Judicial Circuit. Charles Henry Pray, Appellant, vs. W. B. Copes et al., Appellees. Order Extending Time to Record June 20, 1924, to File, etc. Filed Mar. 24, 1924. F. D. Monckton, Clerk.

In the United States Circuit Court of Appeals, Ninth Judicial Circuit.

IN EQUITY—No. F.–89.

CHARLES HENRY PRAY,

Appellant,

vs.

W. B. COPES et al.,

Appellee.

ORDER EXTENDING TIME TO AND INCLUDING MARCH 20, 1924, TO FILE RECORD AND DOCKET CAUSE.

Good cause appearing therefor,

IT IS HEREBY ORDERED that the time heretofore allowed said appellant to docket said cause and file the record thereof with the Clerk of the United States Circuit Court of Appeals, for the Ninth Circuit, be, and the same is hereby enlarged and extended to and including the 20th day of March, 1924.

BLEDSOE,
United States District Judge, S. D. Cal.

[Endorsed]: In Equity—No. F.–89. In the United States District Court, Southern District of California, Southern Division. Charles Henry Pray, Appellant, vs. W. B. Copes et al., Appellees. Order Extending Time to Record to March 20, 1924, to File. Filed Jan. 21, 1924. Charles N. Williams, Clerk.

No. ——. United States Circuit Court of Appeals for the Ninth Circuit. Rule Under Subdivision 1 of Rule 16 Enlarging Time to and Including ——, 192—, to File Record and Docket Cause. Filed Jan. 23, 1924. F. D. Monckton, Clerk.

In the United States Circuit Court of Appeals, Ninth Judicial Circuit.

IN EQUITY—No. F.-89.

CHARLES HENRY PRAY,

Appellant,

vs.

W. B. COPES et al.,

Appellee.

ORDER EXTENDING TIME TO AND INCLUDING JANUARY 20, 1924, TO FILE RECORD AND DOCKET CAUSE.

Good cause appearing therefor,

IT IS HEREBY ORDERED that the time heretofore allowed said appellant to docket said cause and file the record thereof with the Clerk of the United States Circuit Court of Appeals, for the Ninth Circuit, be, and the same is hereby enlarged and extended to and including the 20th day of January, 1924.

December 19, 1923.

WM. P. JAMES,
United States District Judge, S. D. Cal.

[Endorsed]: No. F.–89. In the United States District Court, Southern District of California, Southern Division. Charles Henry Pray, Appellant, vs. W. B. Copes et al., Appellee. Order Extending Time to Record to January 20, 1924.

No. ——. United States Circuit Court of Appeals for the Ninth Circuit. Order Under Subdivision 1 of Rule 16 Enlarging Time to and Including January 20, 1924, to File Record and Docket Cause. Filed Dec. 21, 1923. F. D. Monckton, Clerk.

In the United States Circuit Court of Appeals, Ninth Judicial Circuit.

IN EQUITY—No. F.–89.

CHARLES HENRY PRAY,

Appellant,

vs.

W. B. COPES et al.,

Appellee.

ORDER EXTENDING TIME TO AND INCLUDING DECEMBER 20, 1923, TO FILE RECORD AND DOCKET CAUSE.

Good cause appearing therefor,

IT IS HEREBY ORDERED that the time heretofore allowed said appellant to docket said cause and file the record thereof with the Clerk of the United States Circuit Court of Appeals, for the Ninth Circuit, be, and the same is hereby enlarged

and extended to and including the 20th day of December, 1923.

BLEDSOE,
United States District Judge, Southern District of California.

[Endorsed]: In Equity—No. F.–89. In the United States District Court, Southern District of California, Southern Division. Charles Henry Pray, Appellant, vs. W. B. Copes et al., Appellees. Order Extending Time to Record December 20, 1923, to File, etc.

No. ——. United States Circuit Court of Appeals for the Ninth Circuit. Order Under Subdivision 1 of Rule 16 Enlarging Time to and Including December 20, 1923, to File Record and Docket Cause. Filed Nov. 22, 1923. F. D. Monckton, Clerk.

In the United States Circuit Court of Appeals, Ninth Judicial Circuit.

F.–89—EQ.

CHARLES HENRY PRAY,

Appellant,

vs.

W. B. COPES et al.,

Appellee.

ORDER EXTENDING TIME TO AND INCLUDING NOVEMBER 20, 1923, TO FILE RECORD AND DOCKET CAUSE.

Good cause appearing therefor,

IT IS HEREBY ORDERED that the time heretofore allowed said appellant to docket said cause and file the record thereof with the Clerk of the United States Circuit Court of Appeals, for the Ninth Circuit, be, and the same is hereby enlarged and extended to and including the 20th day of November, 1923.

WM. P. JAMES,
United States District Judge, Southern District of California.

[Endorsed]: No. F.–89. In the United States Circuit Court of Appeals, Ninth Circuit. Charles Henry Pray, Appellant, vs. W. B. Copes et al., Appellees. Order Extending Time to Record November 20, 1923, to File, etc. Filed Oct. 26, 1923. F. D. Monckton, Clerk.

In the United States Circuit Court of Appeals, Ninth Judicial Circuit.

F.–89—EQUITY.

CHARLES HENRY PRAY,
Appellant,

vs.

W. B. COPES et al.,
Appellees.

ORDER EXTENDING TIME TO AND INCLUDING NOVEMBER 20, 1923, TO FILE RECORD AND DOCKET CAUSE.

Good cause appearing therfor,

IT IS HEREBY ORDERED that the time heretofore allowed said appellant to docket said cause and file the record thereof with the Clerk of the United States Circuit Court of Appeals, for the Ninth Circuit, be, and the same is herby enlarged and extended to and including the 20th day of November, 1923.

Sep. 19, 1923.

WM. P. JAMES,
United States District Judge, Southern District of California.

[Endorsed]: No. F.–89. In the United States Circuit Court of Appeals for the Ninth Judicial Circuit. Charles Henry Pray, Appellant, vs. W. B. Copes et al., Appellees. Order Extending Time to November 20, 1923, to File Record, etc. Filed Sep. 21, 1923. F. D. Monckton, Clerk.

No. 4285. United States Circuit Court of Appeals for the Ninth Circuit. Refiled Jul. 15, 1924. F. D. Monckton, Clerk.

No. 4285

United States
Circuit Court of Appeals
For the Ninth Circuit

CHARLES H. PRAY,
Appellant,
vs.
W. B. COPES and J. E. HILL, doing business under the fictitious firm name of TRIANGLE IRON WORKS, and M. J. FITZGERALD and W. A. SAMSON, doing business under the fictitious firm name of NATIONAL FIRE ESCAPE LADDER COMPANY,
Appellees.

Brief of Appellees Copes and Hill

DOUGLAS L. EDMONDS,
1114 Stock Exchange Bldg.,
Los Angeles, Calif.,
Attorney for Defendants-Appellees Copes and Hill.

United States
Circuit Court of Appeals
For the Ninth Circuit

CHARLES H. PRAY,
Appellant,

vs.

W. B. COPES and J. E. HILL, doing business under the fictitious firm name of TRIANGLE IRON WORKS, and M. J. FITZGERALD and W. A. SAMSON, doing business under the fictitious firm name of NATIONAL FIRE ESCAPE LADDER COMPANY,
Appellees.

BRIEF OF APPELLEES COPES AND HILL.

STATEMENT OF THE CASE.

The questions involved in this suit are not complicated and involve only the elementary principles of patent law. Such difficulties as have arisen are present only because the defendants and appellees, through ignorance and mistake, made certain answers to interrogatories which they afterwards found did not conform to the facts. After a decree in favor of plaintiff, the appellees presented the sit-

uation to the District Court in a petition for a rehearing, which was subsequently granted, and on a trial the plaintiff's bill was dismissed and a decree entered finding that the fire escapes made and sold by the defendants are not an infringement on plaintiff's patent or any of the claims thereof.

In his description of the patent in suit, plaintiff has omitted that part of the description of his device which shows on its face that the ladders manufactured and sold by the appellees do not infringe. The object of his invention, according to the statement in the patent, "is to provide a fire escape having second and third floor platforms *with a permanent connecting ladder* and a counterbalanced ground ladder slidable on the permanent ladder and latched in normal elevated position with *the rings of both ladders horizontally alined and positioned in close proximity to each other to form relatively wide steps.*" (See p. 1, lines 13-21 of patent.) This object is further described in the patent as follows:

> "The construction provides a simple and practical fire escape *comprising a pair of closely nested ladders, one stationary and the other slidable thereon* with the slidable ladder normally supported with *the rungs of both ladders relatively horizontally alined and positioned in close proximity to each other to provide a wide step.*" (P. 1, line 108 to p. 2, line 3.)

From this description it is apparent that a permanent ladder between the balconies with a movable ladder slidable thereon, the rungs of both ladders aligned, when the slidable ladder is in its elevated

position, to provide a wide step, are essential elements of the invention. This permanent ladder is particularly mentioned in each one of the four claims of the patent as follows:

"1. A fire escape comprising two relatively spaced stationary platforms and an *intermediate stationary vertical ladder,* a slidable ground ladder, means for retaining said ground ladder in close sliding engagement with the stationary ladder, counter-balance means connected to the ground ladder, and manually operated means normally supporting the ground ladder in elevated position.

"2. A fire escape comprising two relatively spaced platforms *and an intermediate stationary vertical ladder,* vertical guide rods intermediate of and secured to the platforms, a counter-balance weight slidable on said rods, a ground ladder, means retaining the ground ladder in close sliding contact with the stationary ladder, cable sheaves journaled on the upper platform, cables secured to the weight and to the ground ladder and passing over the sheaves, and means carried by the lower platform for normally supporting the ground ladder in elevated position and movable to release said ladder.

"3. A fire escape comprising an upper and a lower platform having relatively alined open hatchways, the lower platform having opposed vertical grooves, *a vertical stationary ladder secured at opposite ends to the upper and lower platform respectively,* a vertically movable ground ladder slidable in said grooves, means for guiding the upper end of the ground ladder relative to the stationary ladder, counter-balance means connected to the ground ladder and a horizontally movable latch normally closing the bottom of one groove and forming a supporting abutment for the ground ladder.

"4. A fire escape comprising an upper and a lower platform having relatively alined open hatchways, the lower platform having opposed vertical grooves adjacent the hatchway, *an intermediate stationary ladder, the upper ends of the side rails of said ladder being secured to the upper platform and the lower ends of said side rails secured to the lower platform adjacent the vertical grooves,* a ground ladder slidable in said grooves, counterbalance means connected to the ground ladder and a manually operated means normally closing the lower end of one of the grooves and supporting the ground ladder in elevated position." (Patent, p. 2, lines 5-57.)

Now the evidence shows conclusively that appellees never manufactured or sold any fire escape having a permanent fixed ladder between balconies, and an examination of the photographs and drawings of structures erected by them shows this to be the fact, as found by the District Court. It is true that the answers of all defendants to the plaintiff's interrogatories were so incomplete as to be misleading and untrue, but this, the court below found, was because of the inexperience of counsel who prepared them. Upon the application of the defendants for a rehearing, the decree was set aside and the defendants relieved from the prejudicial admissions contained in the answers to the interrogatories then on file.

It may here be pointed out that there are two separate defendants, or sets of defendants, the appeal herein being defended by Copes and Hill, doing business as Triangle Iron Works, alone. The relationship of these defendants and the circumstances

under which their first interrogatory answers were made are set forth in their supplemental affidavit on the motion to set aside the decree as follows:

> "In that behalf these defendants say that they are co-partners doing business under the fictitious firm name of Triangle Iron Works and that said business consists in the fabrication and erection of ornamental iron; that on or about the 17th day of October, 1921, the defendant Samson representing himself as an officer or partner of the National Fire Escape Extension Ladder Company negotiated with these defendants for the manufacture and erection by them of such fire escape extension ladders as said Samson might order from them; that subsequently these defendants filled many orders for fire escape extension ladders given them by said Samson but that all of such work was, with the exception of a few ladders erected directly for owners of buildings, for said Samson and as manufacturers of an article sold by the other defendants.
>
> "That at the time said defendants were served with process in this action they went to defendant Samson about the matter and that at said time said Samson assured them that he and the National Fire Escape Extension Ladder Company would assume the entire burden of the litigation and would save these defendants harmless from any liability on account thereof; that relying entirely on said assurances they entrusted the matter of the defense of the action to said defendant, W. A. Samson and thereafter were introduced to one, Victor H. Koenig, an attorney at law, whom said W. A. Samson employed for the defense thereof.
>
> "That thereafter these defendants relying upon the advice and counsel of said Victor H.

Koenig signed the answer herein and also the answers to plaintiff's interrogatories without carefully reading the same or comprehending the import thereof; that their action in this regard was influenced by the assurances of defendant Samson and said Koenig that their joinder as defendants in this action was merely a legal formality and that they could not be held liable for any judgment which might be rendered herein.

"That after the decree was rendered in said action these defendants learned that their defense had not been properly presented and that their answer and answers to plaintiff's interrogatories were not in accordance with the facts, all of which is more particularly set forth in the joint affidavit of these defendants and M. J. Fitzgerald and W. A. Samson heretofore served and filed herein.

"That since said decree was rendered and since the said joint affidavit of these defendants was served and filed, these defendants have been informed and believe and therefore allege that said W. A. Samson is the sole owner of the business styled the National Fire Escape Extension Ladder Company and that said Samson individually is the sole owner thereof and transacting business under said fictitious name; that said W. A. Samson is insolvent and unable to respond to the judgment which may be rendered herein."

We shall discuss the points raised by the plaintiff in the order suggested by him.

ARGUMENT.

Issue I.

Did the Defendants Infringe the Patent in Suit?

Point I.

The Alleged Admissions of Defendants in Their Interrogatory Answers.

The appellant assigns the action of the court below in granting a rehearing as prejudicial error, and this will be answered more fully hereafter. It may here be said, however, that the point now under consideration cannot aid appellant, because it is elementary that the grant, absolute or conditional, of an application for a rehearing which has been made in due time, rests in the discretion of the court where the cause is first heard, and is not a subject of appeal. The court below, in setting aside the decree theretofore made and granting a rehearing, relieved the defendants from the prejudicial admissions contained in the answers to the interrogatories on file. Thereafter the defendants withdrew these answers to plaintiff's interrogatories and substituted others in lieu thereof. Under these circumstances appellant cannot avail himself of the answers which the court below allowed to be withdrawn because admittedly prejudicial and inadvertently made, to aid his position here. And, moreover, the first answers were not offered or received in evidence at the second trial. The record on this point is as follows:

MR. BROWN: That is all. Did I understand the court to enter the order permitting the exhibits in the former case to be included in this case?

THE COURT: I suppose so if there is no objection.

MR. BROWN: Is there any objection to the interrogatories propounded by us in the first case and your answers?

MR. HARPHAM: Your interrogatories and our last answers, or our amended answers to those interrogatories are all right, but not the original answers.

MR. BROWN: No, I understand that. The proofs, proceedings and interrogatories as well as the photographs under the stipulation and the bill, the original of which is on file, in the rehearing.

MR. HARPHAM: And all copies of patents that were offered in evidence or used.

MR. BROWN: Yes. (Transcript, p. 81.)

Yet a careful examination of the blue print filed with those first interrogatories will show that the structure there represented does not infringe plaintiff's patent, notwithstanding plaintiff's lengthy assertions to the contrary. The essential and important element of plaintiff's structure which is lacking in that represented in the drawing filed with defendants' first answer is the stationary vertical ladder between balconies, which, it will be remembered from our discussion of the Pray patent, is mentioned throughout the description and in each of the four claims. An examination of the blue print attached

to the interrogatories shows that there is no permanent fixed ladder between the two balconies. There is a movable ladder, extending in its operating position from the first balcony above the ground to the ground. This ladder can be raised to an elevated position by means of guides extending from the first balcony above the ground to the second balcony. It is to be noted that the blue print plainly states that "it shows the plan for a wrought iron ladder installed on a fire escape where the bottom of the lower balcony is more than twelve feet above the ground." Reference to the slidable or movable ladder shows that it is only slightly over ten feet long, while it is stated that the bottom of the balcony is more than twelve feet from the ground. It is obvious from the drawing that there is a short permanent ladder extending three or four feet below the top rail of the lower balcony, and that when the slidable ladder is lowered its length, added to the length of this short ladder, provides a continuous ladder extending from the first balcony to the ground. This is the only structure which might be considered a permanent ladder. The drawing shows no "intermediate stationary vertical ladder" between the stationary platform, with a movable ladder "slidable upon the permanent ladder and latched in normal elevated position with the rungs of both ladders horizontally alined and positioned in close proximity to each other to form relatively wide steps", as described and claimed in the Pray patent. This permanent ladder extending from the first to the second bal-

cony is an essential element of the Pray combination.

Instead, therefore, of this blue print showing any infringement it, on the contrary, shows an entirely different structure. It is clear that all of the elements of the Pray patent are old in the art. Ladders have been used since the earliest times of mankind, and the claims of invention in this patent must, therefore, be limited to the specific combination of elements as covered in the claims of the patent. As was said by this court in the case of Wilson & Willard Mfg. Co. vs. Union Tool Co., 249 Fed. 729:

> "Combination of elements which are old in the art undoubtedly may be an invention, but the combination must be considered as an entirety or unitary structure. If defendant omits one or more *of the material elements which* make up the combination, he no longer uses the combination; and it is no answer to say that the omitted elements are not essential, and that the combination operates as well without as with them. (Citing cases.) It must also be established by one who alleges infringement of a combination that the entire combination, as a unitary structure and having substantially the same mode of operation is present in the alleged infringing machine." (P. 731.)

The combination in the Pray patent is an essentially different structure from that represented in the blue print. This difference between the structure described in the Pray patent and that represented in the blue print was concisely pointed out by Judge Bledsoe in the trial of the suit. He said:

THE COURT: Mr. Brown, your patent requires an intermediate stationary and vertical ladder between the two spaced stationary platforms?

MR. BROWN: Yes, sir.

THE COURT: And that the movable ladder shall slide upon and in close proximity with that intermediate stationary ladder?

MR. BROWN: Yes, sir.

THE COURT: Now where is that in the defendants' device?

MR. BROWN: In the defendants' device we contend that the ladder B is a stationary ladder.

THE COURT: But they don't use that to go from one platform to the other. It is not intended for that, obviously, and even a man at a fire couldn't use it.

MR. BROWN: That may be very true but what is B if it is not a ladder?

THE COURT: Why it is only a support, obviously.

MR. BROWN: And it has rungs in the support.

THE COURT: No, it hasn't rungs in the support. It has iron bars to prevent distortion. That is all it is.

MR. BROWN: But our contention is—or how many rungs does it take to make a ladder?

THE COURT: That depends on how far you are going. If you had a hundred-foot ladder it would take more than otherwise but your patent calls for two platforms with a stationary ladder between them

and a movable ladder operating upon the stationary ladder. That is your device. There isn't anything to compare with it in the defendants' device. If there is I would like to have you point it out.

MR. BROWN: Aren't we allowed a range of equivalence, if the court please? Is this patent not to be sustained simply because they don't run the rungs all the way up but set them a certain distance from the top?

THE COURT: If your patent calls for a contrivance that enables you to go from one story to the other and they don't use that and don't intend to use it, then they haven't copied your device. They have got a stairway of their own.

MR. BROWN: Yes, but they didn't install it.

THE COURT: It doesn't make any difference, they have a stairway of their own there which is used to go from the second to the third story, and you have installed this stairway for them to go up. (Further argument by Mr. Brown and citation of authorities.)

THE COURT: It is an essentially different structure and I don't see any infringement so the complaint will be dismissed and defendants' counsel will prepare a decree.

The device mentioned as "B" in the foregoing is the pair of guides or stringers extending above the railings of the first balcony on which the ground ladder may be raised to its elevated position. These stringers have two iron bars spaced equally distant

between the first and second balcony, to prevent distortion.

The basic and fundamental difference between the structure represented by the Pray patent and that manufactured and sold by the defendants is that there is no intermediate stationary ladder between the stationary platforms as described and claimed in the former. And it is absurd to say that the two stringers on which the movable ladder as erected by the defendants is raised, is a stationary ladder, because there are two stiffeners for this frame in fourteen feet. It is obvious, without the presentation of evidence, or citation of authority, that two of these stiffeners, placed between the upright guides in a total distance of fourteen feet could not make the structure a "permanent ladder" by the wildest stretch of imagination. As was very aptly remarked by the court during the testimony of the engineer describing the structure claimed to be an infringement:

Q. (By Mr. Harpham): Would it be possible for a man to go up and down on those rungs from the second balcony to the third balcony, or from the third balcony to the second?

A. It would be very easy to go down.

Q. (By the Court): You could go down without any rungs at all or any structure. (Transcript, p. 75.)

Point II.

The Alleged Los Angeles Ordinance.

There was no proof made by plaintiff of the existence of Ordinance No. 28700, or any other ordinance of the City of Los Angeles requiring a permit to erect fire escapes. The copy of such alleged ordinance set out on page 28 of plaintiff's brief is, therefore, entirely outside the record and should not be considered by this court.

Point III.

As to the Blue Print Attached to the McKeag Affidavit.

Plaintiff expressly states, when taking up this point in his brief (p. 29), that "the affidavit of C. E. McKeag, on file with the appeal papers in this cause, although not numbered as an exhibit", shows certain things. This affidavit was not introduced in evidence, and it is entirely outside the record and should not be considered by this court. Yet if it is to be considered, the blue print attached to the affidavit is the same one attached to the first set of defendants' interrogatories. The structure represented by this blue print was particularly discussed under Point I.

Point IV.

As to the Affidavit Supporting Defendants' Motion To Vacate the Interlocutory Decree.

It is inconceivable how any person reading the defendants' affidavit and carefully examining the

photographs which are a part of it, could reach the conclusions stated by counsel under this point in their brief. The photograph which most clearly shows the structure manufactured by these appellees is designated as Exhibit "B" and appears on page 34 of the transcript. The guides which plaintiff is seeking to call a "permanent ladder" between the balconies are designated on this photograph as 6. They have one stiffener extending horizontally between them, and it is on this structure, if it is a ladder of any kind, that persons would have to go up or down between balconies. The comment of the district judge on the claim that this is a ladder of any kind is a complete answer to it.

And we further assert with all positiveness that the blue print attached to the original answers of the defendants to plaintiff's interrogatories shows exactly the structure represented on this photograph, without any permanent ladder between the two balconies and only the guides as shown. The original answers showed clearly that counsel who prepared them did not, or could not, read the blue print which he made a part of them, because there is no permanent ladder between the balconies shown on it. He mistakenly pointed out minor differences in construction, and the error was so obvious that the court below relieved the defendants from the prejudicial situation these answers placed them in. No one experienced in reading blue prints and familiar with mechanical construction could possibly make the answers which the defendants made to

questions 3 and 9 of plaintiff's interrogatories with the blue print which was attached to those answers before them.

Defendants have consistently maintained, and supported their position with uncontroverted evidence, that, as stated by them in their affidavit, "they have never built, or had built for them, any second and third story platforms with a permanent ladder extending from one to the other; that they have never made or installed any movable ground ladder which was held in sliding contract or engagement, or any contact or any engagement with the permanent ladder which in fire escapes extends from the second to the third story platform". (Appellant's Brief, p. 15.)

Point V.

The Times Structure.

These appellees maintain that the structure which they manufactured and which was later installed by their co-defendants upon the Times building in Los Angeles is the only type which they ever manufactured and that it does not infringe the plaintiff's patent. There is no permanent ladder between the second and third balconies in this structure, and the photographs in evidence clearly show this. Plaintiff maintains that there is nothing in the patent in suit indicating the number of rungs or rounds which a ladder between balconies must contain to be a ladder. Yet he includes in his argument Webster's definition of a ladder as "a frame, usually, portable,

of wood, metal or rope, for ascent and descent, consisting of two side pieces to which are fastened cross strips or rounds forming steps." (Appellant's Brief, p. 39.) Any ladder, if it is to be used for a ladder, must be reasonably usable for ascent and descent. The photograph of the Times structure shows two rods inserted horizontally between the guides extending from the second to the third balcony. The distance between these balconies was testified to be 12 to 14 feet. These rods, it was proved, were put in to stiffen the frame and prevent distortion, and are substantially equally distant from the top of the second floor balcony, the bottom of the third floor balcony, and from each other. It is absurd to contend that two uprights extending this distance and with two horizontal rods or rungs are a ladder usable for ascent and descent.

Of course, the patent in suit does not state how many rungs the permanent ladder must contain. Obviously the number would depend upon the length of the ladder, but two rungs in fourteen feet could not under any circumstances make a ladder.

Appellant attempts to invoke in this case the doctrine of equivalents, which can have no possible application to the case at bar. The defendants, in their structure, have not sought to substitute anything for the permanent fixed ladder between balconies which the Pray patent claims; they do not provide any means for ascending or descending from the second floor balcony to the third floor balcony; they do not build any contrivance which makes relatively wide

steps for the ladder between these balconies. They provide only a ladder for use from the first floor balcony to the ground, this ladder slidable upon guides. Removal of the permanent ladder changes the entire theory and use of the plaintiff's structure, and the doctrine of equivalents has, therefore, no application here.

As was said in the case of Wilson & Willard Mfg. Co. vs. Union Tool Co., 249 Fed. 729, 731:

> "To make one mechanical device the equivalent of another, it must appear, not only that it produces the same effect, but that such effect is produced by substantially the same mode of operation."

Where, may we ask, have the defendants provided any equivalent for the permanent fixed ladder in the Pray patent, or anything by which the same effect (in this case a structure to pass up and down from balcony to balcony) can be produced? There is no equivalent of this in the defendants' structure, and this omission constitutes the distinctive difference between them.

ISSUE 2.

Point I.

The Construction of the Patent in Suit.

The defendants not only pleaded the Pauly patent in their answer, but relied upon it in the trial of the case and introduced it in evidence as Defendants' Exhibit "A" (Transcript, p. 82) to show the state of the prior art. The Pauly structure was patented

May 25, 1915, over five years before the Pray patent was issued. This patent provides for counterbalanced stairs latched in normal elevated position above the balcony on the second floor of a building, but which may be lowered to provide a means of descent from this balcony to the ground. The only substantial mechanical difference between the structure described in this patent and the one manufactured by the appellees is that in the Pauly patent the movable stairs on being lowered swing outward from the building to provide a stairway at an angle instead of a vertical ladder. The claims of the Pauly patent show that it provides for guideways from the second to the third balconies on which these stairs may be raised when not in use in practically the same style of construction as used by the appellees. No use of such guides as a ladder is claimed; indeed, the patent recites that "suitable stairs 17 may lead in the usual way from an opening in each balcony to the next lower balcony." (Patent, Defendants' Exhibit "A", p. 1, lines 88 to 91.) This clearly shows the state of the prior art and that the Pauly patent is for a structure mechanically identical with that manufactured by appellees.

Point II.

Appellant asserts with evident seriousness that the Pray patent was for a basic and important invention, and he cites Hopkins on Patents as authority for the liberal construction of such a patent. It is, of course, admitted that pioneer patents are en-

titled to a liberal construction, and that there is, as to them, a wide range of equivalents. But the Pray patent could not possibly come within this class. Every element in the Pray patent is old in the art, and this court has stated in the case of Wilson & Willard Mfg. Co. vs. Union Tool Co. (*supra*) that the claim for a combination is not infringed, if any one of the elements is omitted, without substitution of an equivalent. The same elementary rule of construction announced by this court as applying to such cases has also been reached in the recent case of William B. Scaife & Sons Co. vs. Falls City Woolen Mills, 194 Fed. 139, at p. 146, where it was said:

> "Furthermore, it is a general rule that the improved combination for which a patent is granted must be limited by the elements therein specified. If the old elements were combined in a substantially different way, or if the purifying result be accomplished by a different combination in defendant's apparatus, there might be no infringement. In other words, patents for improved combinations must be construed strictly, *there being no legal right to a monopoly in cases where there is a mere improved combination except in respect to what is substantially that very combination,* the law leaving it open to all others to make any other combination of old things which is not substantially the same as the one described in the patent. We think this plainly results from the decisions in many cases, and, furthermore, we think the rule is particularly applicable to cases like this. After we had written to this point, there came from the clerk in due course, a copy of the opinion of the Circuit Court of Appeals of this circuit

in the case of the Union Paper Bag etc. Company v. Advance Bag Company, 194 Fed. 126, decided January 3, 1912, in which the court, speaking through Judge Warrington, said:

" 'It is settled that a claim for a combination is not infringed if any one of the elements is omitted without substitution of an equivalent'.

"This proposition was based upon what the Supreme Court in an opinion by Mr. Justice Day had said in Cimiotti Unhairing Co. vs. Am. Fur Refining Co., 198 U. S. 410, 25 Sup. Ct. 702, 49 L. Ed. 1100, as follows:

" 'In making his claim the inventor is at liberty to choose his own form of expression; and, while the courts may construe the same in view of the specifications and the state of the art, they may not add to or detract from the claim. And it is equally true that, as the inventor is required to enumerate the elements of his claim, *no one is an infringer of a combination claim unless he uses all the elements thereof.* Shepard v. Carrigan, 116 U. S. 593, 597 (6 Sup. Ct. 493, 29 L. Ed. 723); Sutter v. Robinson, 119 U. S. 530, 541 (7 Sup. Ct. 376, 30 L. Ed. 492); McClain v. Ortmayer, 141 U. S. 419, 425, (12 Sup. Ct. 76, 35 L. Ed. 800); Wright v. Yuengling, 155 U. S. 47, (15 Supt. Ct. 1, 39 L. Ed. 64); Black Diamond Co. v. Excelsior Co., 156 U. S. 611 (15 Sup. Ct. 482, 39 L. Ed. 553); Walker on Patents, 349.'

"It may also be remarked that in such cases the range of equivalents is narrow."

So, also, the Circuit Court of Appeals for the Third Circuit, in Underwood Typewriter Co. vs. Royal Typewriter Co., 224 Fed. 477, said:

"In an overcrowded art, where a broad generic invention is not possible, a defendant who

> omits altogether one element of a combination cannot be held liable as an infringer, even though he makes another element do the double work." (P. 479.)

And in McCaskey Register Co. vs. Mantz, 224 Fed. 495, the court said:

> "Since the claim calls for the two elements, it cannot be infringed by a device which employs one only, where there is nothing of a pioneer character in the patentee's device." (P. 496.)

Issue 3.

The Asserted Error of the District Court in Granting a Rehearing.

It has so long been held that the action of the District Court in granting or denying a rehearing will not be reviewed, that the citation of authorities is almost superfluous. In Foster's Federal Practice, Fifth Edition, Vol. II, Sec. 445, p. 1399, it is said:

> "The grant or refusal, absolute or conditional, of an application for a rehearing, which has been made in due time, rests in the sound discretion of the court where the cause is first heard, and is not a subject of appeal." Citing numerous authorities.

The defendants had obviously been misled into signing and swearing to answers to plaintiff's interrogatories which did not correctly state the facts, and which even a casual inspection of the drawings of the structures involved shows did not state the facts. It was therefore not only proper but incumbent upon the court, particularly in an equity case, to relieve the defendants from this prejudice for

which they were not responsible. Any other conclusion would have resulted in a grievous miscarriage of justice.

CONCLUSION.

We confidently assert that the entire record in this case shows conclusively that the defendants have not infringed the plaintiff's patent; that they manufactured a totally different structure, following closely the lines of the Pauly patent, which anticipated the Pray patent; that their position has been entirely consistent throughout, and that they are entitled to the decree entered by the District Court.

DOUGLAS L. EDMONDS,

Attorney for Defendants-Appellees Copes and Hill.

IN THE

United States Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

Charles Henry Pray,
Appellant,

vs.

W. B. Copes and J. E. Hill, Doing Business Under the Fictitious Name of Triangle Iron Works; and M. J. Fitzgerald and W. A. Samson, Doing Business Under the Fictitious Name of National Fire Escape Ladder Company,
Appellees.

APPELLANT'S REPLY BRIEF.

RAYMOND IVES BLAKESLEE,
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APPELLANT'S REPLY BRIEF.

STATEMENT.

Permission having been granted to plaintiff-appellant by this Honorable Court to file a reply brief, certain questions and points raised in appellees' brief will be briefly discussed and likewise certain inadvertent errors that appear in appellant's opening brief will be corrected. Attention is first directed to corrections necessary in appellant's opening brief.

Corrections:

Page 4, fourth and fifth lines from the bottom read:

"On the 19th day of February, 1923, the court denied such petition to vacate the interlocutory decree as".

This should read:

"On the 19th day of February, 1923, the court denied plaintiff's petition to re-hear defendants' petition to vacate interlocutory decree as".

Page 21, assignment of error X, the date instead of being "July 13, 1923", should read "April 8, 1922". The transcript is also in error as to this. [See Tr. p. 94.] Appellant's opening brief, page 13, states the date correctly.

We also note on page 39 of appellant's opening brief quotation marks, fourth line from the bottom of the page, which obviously should not be present.

Page 43, it was stated, last paragraph:

"Mr. Harpham apparently, despite his experience, was unable to find in the prior art any patents or publications which he could introduce upon the retrial of the cause to anticipate or otherwise limit the patent in suit, and the record of this case shows that there was no prior art of any kind introduced into evidence for any purpose whatsoever."

What really happened appears on page 82 of the transcript, and what should have been said was that *no prior patent was offered in evidence as pleaded.*

It will be noted upon reference to Tr. p. 82 that objection was made to the introduction of the Pauly patent except to show the state of the prior art, for the reason that such patent was not a certified copy

as required by Sec. 892 of the Revised Statutes of the United States. The court admitted the *uncertified* copy, apparently to show the state of the art, and this admission of an uncertified copy was similarly objectionable. We know of no equity rule that requires an exception to be noted to this ruling of the court. At the time the brief was written, counsel for plaintiff-appellant did not have before them the transcript of the testimony, and upon enquiring of the clerk of the District Court just what exhibits had been transmitted to this Honorable Court was informed that there were no exhibits on the part of defendants-appellees, and due to the lapse of time since the case was tried on rehearing, counsel had completely forgotten the fact that the Pauly patent was introduced to show the state of the art.

Pauly Patent.

It is not believed that defendants-appellees would claim that a structure made in accordance with the Pauly patent teaching infringes the Pray patent, even assuming that the Pray patent was first in point of time, nor is it believed that defendants-appellees would contend that a structure made in accordance with the Pray patent is an infringement of the Pauly patent, for if they did or had so believed this to be, it is very likely that they would have inserted a counterclaim as against plaintiff-appellant instead of alleging that they manufactured under this patent, as they did in their answer, allegation VI, Tr. p. 52. The general rule, as has been repeatedly annunciated in

numerous decisions, is that *that which anticipates if earlier would infringe if later,* and when this rule is applied and the Pauly patent is duly considered, with relation to the structure therein described, the difference between it and the structure of Pray will be readily appreciated. We shall describe the differences between the structures, but before setting forth such differences we desire to call the court's attention to the fact that the Pauly patent is not properly before this court, for the reason that counsel for defendants-appellees at no time attempted to describe the Pauly patent, nor show that the fire escape manufactured by them was made in accordance with such Pauly patent. An inspection of the transcript of the testimony will show this to be true, and certainly counsel's brief on behalf of defendants-appellees, Copes and Hill, at pages 18 and 19, does not point out the distinction between their structure and the Pray patent structure, but rather attempts by innuendo to state that the Pauly patent device and the Pray patent device are for one and the same thing. However, defendants-appellees cannot argue at this time that the Pauly patent structure anticipates the Pray structure, for the very reason that the Pauly structure was not set forth or introduced into evidence as an anticipatory structure, and cannot be considered by the court as such; and furthermore, prior art patents *not so pleaded* are *not admissible as anticipations,* as see Sodemann Heat & Power Co. v. Kauffmann, 275 F. 593. (Decree 267 F. R. 435 reversed) (C. C. A. 8th Cir. 1921.)

> "Prior patents, not pleaded, and of which notice has not been given as required by Rev. St. Sec. 4920, as amended (Comp. St. Sec. 9466), while they may be admitted as showing the prior art, in aid of the construction of a claim, are not admissible as anticipations, or to invalidate the claim for want of novelty. Where, under the present equity rules, evidence must be taken in open court, this requirement of notice should be strictly enforced."

In addition to this, uncertified copies of patents are not evidence, as see the case of National Cash Register v. Gratigny, C. C. A. Sixth Circuit, 213 Federal Rep. 463, 467, in which the court said:

> "[4, 5] The patent copies, being uncertified, were not legally admissible."

and as we have previously pointed out, we know of no equity rule that requires us to note exception to the court's allowing the uncertified copy of the Pauly patent to be introduced into evidence.

As to the Pauly patent, a brief analysis will show its entire want of anticipatory character, even had it been so pleaded. The Pauly patent fails to show any fixed ladder between balconies with which a ground ladder is combined or by which it is guided. It shows a pair of spaced guideways, 18 (without rungs), vertically movable bars 22 guided therein (without rungs), stairs 24 connected to the lower portion of the bars 22 by links 28; the upper ends of the side members of the stairs 24 having rollers 30 guided by the guides 31 on the spaced bars 22; hand rails 27 pivoted to links

29, in turn pivoted to the stairs 24 and having rollers 32 guided by the guides 31. The stairs 24 are supported by ropes or cables 36 branched at 38 as shown in Figure 5, the cables in turn being connected to the counterbalance weight 33. It will be noticed that there is *no fixed ladder* with rungs between balconies or connected at a side of the balcony railing in this device. The bars 22 do not even extend from balcony to balcony. In operation, as set forth in claim 1, for instance, as the stairway 24 is raised the links 28 and 29 permit the hand rails 27 and stairs to swing in parallel with the guideways 18 and spaced bars 22. When this operation is completed, stairs, hand rails and bars 22, all in parallel relation, move upwardly guided by the guideways 18. On reversal, the parts are lowered and the stairway swings out into inclined position with its hand rails as shown in Figure 6. A latch device 42 cooperates with a projection 43 on the guideways 18 when the swinging stairway and hand rails are elevated. Now, in the first place, *this device has absolutely no fixed ladder between balconies guiding a vertically slidable ground ladder, so one element of the Pray patent claims is entirely missing.* This alone avoids any possible anticipation. In the second place, *the entire mode of operation is varied by providing in the combination a ladder and hand rails that swing and collapse, in addition to sliding. The combined fixed ladder with rungs and sliding ladder guided by it, which are elements of the Pray claims, are entirely lacking in this device.*

It will be seen that the Pauly device is for an entirely different structure than that of the Pray patented device. The mode of operation is different, and defendants-appellees, we contend, have *copied* the Pray patented structure, *impairing the function* of certain elements thereof, namely, the fixed ladder structure, for the simple reason that a fixed stairway is oftentimes placed between balconies, and for this reason it would be unnecessary to put in all the rungs of the fixed ladder between the balconies. The fact remains, however, that defendants-appellees do provide a fixed ladder. True, certain of the rungs are missing, but this does not avoid infringement. In part of the fixed ladder they are fully present and can be used and are intended to be used for scaling purposes. Counsel for defendants-appellees in his brief, page 9, says:

"Reference to the slidable or movable ladder shows that it is only slightly over ten feet long, while it is stated that the bottom of the balcony is more than twelve feet from the ground. It is obvious from the drawing that there is *a short permanent ladder* extending three or four feet below the top rail of the lower balcony, and that when the slidable ladder is lowered its length, added to the length of this short ladder, provides a continuous ladder extending from the first balcony to the ground." (Italics ours.)

It will be seen that counsel admits that they have *"a short permanent ladder."* This so-called short permanent ladder consists of two stringers extending between two balconies, with quite a number of rungs joined thereto, and ranging downwardly from the lower balcony railing top. It is admitted, as counsel

for defendants-appellees would have us believe, that a person should climb over the first balcony railing and step upon these rungs of the fixed ladder in order to reach the rungs of the movable ladder when the movable ladder is in its lowered position. Counsel in his argument before this Honorable Court on Wednesday the 8th of October, stated apparently referring to the Times installation, that the distance between the balconies was fourteen feet and that the distance from the first balcony to the ground was twelve feet. If this is true, then it would not be necessary, we contend, for defendants-appellees to manufacture a *short* movable ladder as they could manufacture a movable ladder fourteen feet or more long *and avoid the necessity of having a permanent ladder.* However, the defendants-appellees did not choose to do so, but preferred to follow the Pray patented teaching and structure, that is, providing a fixed ladder and a movable ladder slidable in conjunction therewith. The case of Renfield v. Chambers, 92 Fed. R. 630, is directly in point, in which the court said:

> "We think O'Brien's structure comes within the settled rule that infringement is not avoided by impairment in degree so long as the function is retained."

And this Honorable Court has also enunciated the same doctrine in the case of Stebler v. Riverside Heights Orange Growers' Association, 205 Fed. R. 735. (See excerpt from this case in plaintiff's opening brief, page 40.)

Upon the question of infringement the claimed structure itself is to be looked to and not the results obtained, except as they may go to the question of identity, and infringement is not avoided because the patented device is not utilized to the full extent possible nor because a feature is retained which might be dispensed with to advantage and which it was one of the purposes of the patented device to render unnecessary. —(C. C. 1906) Wills v. Scranton Cold Storage Co., 147 F. 525, decree affirmed; Same v. Scranton Cold Storage & Warehouse Co. (C. C. A. 1907), 153 F. 181, 82 C. C. A. 355.

To the same effect, see:

Kawneer Mfg. Co. v. Toledo Plate & Window Glass Co., 232 F. 362, judgment affirmed, 237 Fed. 364; and

Kawneer Mfg. Co. v. Detroit Show Case Co., 240 Fed. 737.

The patent law does not permit one claiming a ladder *as such,* to have his monopoly tampered with by a person leaving out one or more rungs *and particularly in a structure that can be easily and usefully employed as a ladder throughout part of its length or have rungs added.* From the top of the ground ladder when lowered, occupants of the Times Building or fireman handling hose, *would have to use the lower portion of the fixed ladder as a ladder in climbing down or up over the railing to the lower balcony.* Whether the ladder be so equipped that all the rest of its length can be conveniently employed for climbing or handling hose, etc., is a matter of choice and preference. In

the case of Wilson v. Union Tool Co., 237 Fed. 847 (affirmed by Your Honors in 249 Fed. 736), Judge Cushman well said in handling a fallacious issue of this sort raised by defendant (p. 854):

> "The fact that defendant did not appropriate the perhaps relatively more important conception of Wilson, whereby the cutter shanks were allowed to collapse between the prongs, does not excuse it or take from the infringement it has practiced, for the seat or bearing of a cutter head on these faces or lugs, is not dependent upon the swing in collapse of the cutter shanks between the prongs."

To use the invention of the patent for any purpose, to any extent, is an infringement and we have frequently so argued before this court. As said in Acme Truck & Tool Co. v. Meredith, 183 F. 124:

> "A patentee who has sufficiently described and distinctly claimed his invention is entitled to every use to which his device can be applied, whether he perceived or was aware of all such uses at the time he secured his patent or not."

Walker on Patents, end of Section 346, Fourth Edition, page 304, says:

> "Harmoniously with its decision in Burr v. Duryee, the Supreme Court has since had a positive tendency to disregard whatever is abstract and intangible in questions of infringement, and to base its conclusions upon the concrete features of the issues at bar."

This court certainly will not permit a defendant *to adopt* the whole combination of a patented invention, *with its identical mode of operation,* and merely vary

the number of rungs in a ladder entering into that combination, for it is immaterial from the standpoint of infringement, whether the manufacturers or the users take out or put in one or more rungs in what is obviously a ladder and usable as such, *and admitted to be such.*

Consideration of Certain Points Raised in Defendants-Appellees Brief.

Taking up appellee's brief further, on page 7 something is said about the first answers to the interrogatories not being offered or received in evidence at the second trial. This may be true, *but the whole proceeding leading to the granting of the re-trial was based upon an alleged mistake of defendants in swearing to these answers as they did.* Surely the defendants cannot equitably and honestly attempt to withhold these first alleged erroneous answers from the scrutiny of this court, when they refer to them themselves in their brief as they do, pages 14 and 15. They have argued these first alleged erroneous answers right into the case [Tr. p. 81]. Furthermore, plaintiff's counsel on the trial very carefully offered all the "proofs, proceedings and interrogatories," on the second trial, although the original answers were understood to be excluded from evidence. But certainly this court on a review of the entire matter, and in the light of the distinct reference to the same made by defendants in their brief, as above noted, will needs consider those first answers. Among our assignments or error appears the assignment X [Tr. 94], "That said court erred in

setting aside the answers to interrogatories filed July 13, 1923," which as we have seen should read "April 8, 1922." This is a part of the *res gestae* (See Jones on Evidence, civil edition), and it is an essential and vital part particularly with respect to that equitable phase of the case pertaining to clean hands. The assignment of error XVII [Tr. 96] deals with the unclean hands of defendants on rehearing. Assignments XI and XII deal with the error in setting aside the first decree and in granting a rehearing. These assignments are sufficiently broad to bring in this whole question of the first answers to the interrogatories. Infringement in this case is made out by an inspection of the photographs of the Times structure admittedly made by defendants as per stipulation [Tr. 69, 70]. But infringement is further established and admitted by these first interrogatory answers in which the rungs of the fixed ladder are marked as rungs.

On page 7 of appellees' brief, something further is said about the first interrogatory answers. In this connection, as to the propriety of the courts considering this part of the *res gestae* we call attention to Your Honors' consideration of a mere affidavit of one Thorne filed with the petition for rehearing in the case. Willard *et al* v. Union Tool Co., 253 Fed. R. 48, at page 52.

The whole attempt of appellees' counsel on pages 12 and 13 of their brief to make it appear that defendants only have two stringers spaced apart with stiffeners to prevent distortion, when these stringers are the side rails of a real ladder, is so absurd that we cannot under-

stand how the trial court could find non-infringement, particularly in view of these first interrogatory answers, and the obvious facts already set forth that the fixed device is certainly materially usable as a ladder without the addition of any further rungs.

The only reason that the ordinance of the city of Los Angeles was referred to (page 14 of appellant's brief), is that this ordinance was read to the court on the argument of the motion for rehearing. It does not make any difference one way or another whether it be considered or not. It simply assists in showing the unclean hands of defendants who filed the same blue prints with the city of Los Angeles in obtaining permission to do business as they attached to their first interrogatory answers.

On page 16 of appellees' brief a contradiction is given by appellees to the photograph they introduced on their petition for rehearing. They have admitted making the Times structure, which is obviously very different from the structure of their photographs.

The authorities referred to on pages 20 and 21 of appellees' brief are not at all in point. Every one of the elements of the Pray patent claims *as such* appear in defendants' device.

In this case infringement is not only proven but admitted. The defendants were men skilled in the art and they swore to the first interrogatory answers admitting infringement *knowingly and openly*, and simply used the method of changing counsel in order to make it appear that they were in error. If defendants are not believed under oath and are permitted to

change their proofs as to facts, directly before them, and nailed fast to the record by documentary evidence such as blue prints, there would never be an end to any litigation. The chicanery of defendants is shown by the very significant difference between the showing of the photographs attached to their petition for rehearing and the showing of the photographs of the structure they have admitted they installed upon the Times Building.

In what shall we believe the appellees? Shall we believe their first interrogatory answers, or shall we believe them when they say the Times structure is theirs and it disagrees with the structure of their own photographs? They said the blue prints attached to their corrected first interrogatory answers were correct, and these show a fixed ladder and the rungs are marked "rungs."

The authority we cite in our opening brief at page 26, 249 Fed. 729, was a rule laid down in a case decided for defendant. But we cited it without hesitancy inasmuch as it thoroughly fits the present case.

The McKeag affidavit should be considered on the question of unclean hands of defendants. It got into the case on the rehearing matter, and is part of the *res gestae* and very significant, as we say, on the question of unclean hands of defendants.

The Testimony of Mr. Copes Upon Re-hearing is Contradictory.

Mr. Copes upon direct examination testified as follows [Tr. pp. 84, 85]:

"Q. Have you ever manufactured any fire escapes comprising 'two relatively spaced stationary platforms and an intermediate stationary vertical ladder, a slidable ground ladder, means for retaining said ground ladder in close sliding engagement with the stationary ladder, counter-balance means connected to the ground ladder and manually operated means normally supporting the ground *latter* in elevated position'?

A. No, sir."

And upon cross-examination [Tr. pp. 86 and 87], the testimony was as follows:

"Q. (By Mr. Brown.) What did you manufacture of the structures shown in the drawing?

A. A slidable ground ladder.

Q. And that is marked how?

A. That is marked A.

Q. And what else?

A. The frame that is marked B here to support the guides.

Q. And where did you place that frame?

A. That was placed from the second to the third floor.

Q. And its purpose was what?

A. For a guide for the sliding ladder A.

Q. Are there any rungs on that frame between the second and third balconies?

A. Only such rungs, or you might call them rungs, as are put in there for braces.

Q. And the rungs at the bottom of the frame, what are they for, referring to the second photograph?

A. They were prepared to go from the bottom balcony down.

Q. Were they attached to the frame?

A. Yes, sir.

Q. What else did you manufacture of that structure?

A. Well, the counter-balance.

Q. That includes the cable and the balance, does it? (69)

A. Yes, sir.

Q. And do you have sheaves in the structure?

A. Yes, sir.

Q. Where are they?

A. They are at the top of the frame B.

Q. Did you hold the ladder in elevated position, the movable ladder?

A. Yes, sir, with a locking bar up in the center of the frame. It wasn't in the bottom of the groove.

Q. And it engaged the movable ladder, did it?

A. Yes, sir.

Q. And held it in elevated position?

A. Yes, sir.

Q. And did the movable ladder slide upon the frames or was it guided by the frames in its movement?

A. There were clips on the frame.

Q. And it guided the movable ladder?

A. Yes.

Mr. Brown: That is all."

It will be noted that the device that Mr. Copes stated upon direct examination that he *did not manufacture* was the very device that he admitted that *he did manufacture,* upon cross-examination. Yet, the defendants-appellees upon the rehearing wished the court to believe, *First,* that their first interrogatory answers, Plaintiff's Exhibits 3 and 4, at the first hearing, *were incorrect; Second,* that the *blue print* attached to such interrogatory answers on first hearing *showed their structure* but that we did not read it correctly; *Third,* that they only manufactured *one form* of ladder and

that was *in accordance with their photographs attached to their notice of motion, and motion to vacate interlocutory decree* [Tr. p. 24]; *Fourth,* that the stipulated structure shown by the Times photographs was a true representation of what was manufactured by them, and yet they attempt to reconcile their contradictory statements by attempting to assert that they did not have a permanent ladder with a movable ladder, slidable in conjunction therewith, and yet admit in their brief, page 9, that they had a short fixed ladder, with further admissions as to what they manufactured when cross-examined on rehearing [Tr. pp. 86, 87 *supra.*]

The Testimony of Mr. Samson on Re-hearing.

Mr. Harpham asked Mr. Samson the following question [Tr. p. 88]:

"Q. Have you ever sold or made or used any fire escape structures which had a second and third floor platform and *a permanent ladder extending from the one platform to the other?*

A. I have, yes, sir. I have sold them. I never manufactured them but I have had them manufactured." (Italics ours.)

This is further admission as to what the defendants-appellees were actually doing.

We do not believe that this Honorable Court will allow the defendants-appellees to escape the consequences of their infringing acts, and this court has said in the case of Central California Canneries Co. v. Dunkley, 247 Fed. 791, at 793:

> "If Campbell's testimony was not true, he was testifying falsely concerning a material and relevant matter, and his testimony would for that *reason be wholly rejected. 'Falsus in uno, falsus in omnibus.'*" (Italics ours.)

This court cannot believe the defendants-appellees because of their contradictory statements. But their many admissions are binding upon them. The fact that the defendants-appellees asked to be relieved from infringement (when and because they told the truth by their first interrogatory answers, Plaintiff's Exhibits 3 and 4, first hearing), should be particularly significant.

Reversal is again solicited.

Respectfully submitted,

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J. CALVIN BROWN,

Solicitors and Counsel for Appellant.

No. 4285.

IN THE

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PETITION FOR REHEARING.

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vs.

W. B. Copes and J. E. Hill, Doing Business Under the Fictitious Name of Triangle Iron Works; and M. J. Fitzgerald and W. A. Samson, Doing Business Under the Fictitious Name of National Fire Escape Ladder Company,
Appellees.

PETITION FOR REHEARING.

Now comes appellant Charles H. Pray, above named, and petitions this Honorable Court for a rehearing upon the following grounds and for the following reasons:

That this Honorable Court, in its opinion filed October 20, 1924, affirming the decree of the lower court, fell into misapprehension of law and fact in not reversing the decree of the lower court dismissing the bill of complaint, apparently upon and only upon the

failure of this Honorable Court to find that appellees omitted from their structure one element, and one element alone, of the claims of the Pray patent in suit, in true meaning and substance, to-wit, a fixed ladder extending between two balconies.

As we understand it, the appelleees have made no contention, and this Honorable Court does not indicate by its opinion, that all the other elements of appellant's claim are not present in appellees' structure. As we take it, the whole issue narrows, on the merits, to the proposition of whether or not appellees' fixed ladder structure *has enough rungs in it, or may have enough rungs in it,* to be denominated *a ladder.* We submit again that this question is completely solvable in favor of appellant by an application of the doctrine of suppressed or impaired function within the decision of King Ax Co. v. Hubbard, C. C. A. Sixth Circuit, 97 Fed. 795, 803, cited in our opening brief, opinion by Judge Taft, now Supreme Court Chief Justice.

If this fixed device, with its *rungs,* be even separately considered, what *can* it be named unless a ladder? And it has further the function of *guiding the ground ladder* in the patented combination and in appellees' structure. Is is wise patent law to make the test of infringement here how *many* rungs are used or *how far apart* they are? Would that be a proper test regarding pickets of a picket fence in a patented combination? Appellees have admitted under oath and by brief that the fixed part *is a ladder with rungs. Claim 1 calls for "platforms," not even balconies with railings and the rungs are certainly intermediate such "platforms" in appellees' device. The addition of railings is not controlling.*

We earnestly submit this question for the merely brief further consideration which we think it will require of Your Honors, and with no desire to overburden Your Honors during a term of court unusually lengthy. Mr. Pray is a poor man, and it has been with great financial difficulty that this case has been tried and appealed, and it would not have been had his counsel not been honestly and emphatically convinced that the doctrine above-mentioned was applicable to the case.

We believe that the reply brief in this case, while filed technically on time, did not reach Your Honors until the day your decision was handed down, and possibly had not been read when the opinion was formulated. Briefly, but with great pains, we set forth and recapitulated therein points, authorities and excerpts from testimony which we earnestly call to Your Honor's attention, in support of this petition; and we adopt said reply brief, (with further reference to the opening brief), with the above remarks and contentions, as the brief on this petition.

Respectfully submitted,

RAYMOND IVES BLAKESLEE,
J. CALVIN BROWN,
Solicitors and Counsel for Appellant.

I, Raymond Ives Blakeslee, the undersigned, hereby certify that in my judgment the foregoing petition is well founded, and it is not interposed for delay.

RAYMOND IVES BLAKESLEE,
Of Counsel for Appellant.

No. 4286

United States
Circuit Court of Appeals
For the Ninth Circuit.

HOBBS WALL & COMPANY, a Corporation,
Plaintiff in Error,

vs.

S. PETTERSON,
Defendant in Error.

Transcript of Record.

Upon Writ of Error to the Southern Division of the United States District Court of the Northern District of California, Second Division.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

No. 4286

United States

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INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

Index. Page

NAMES AND ADDRESSES OF ATTORNEYS OF RECORD.

H. W. HUTTON, Esq., San Francisco, Calif.,
Attorney for Plaintiff and Appellee.
JONES & DALL, Esqrs., San Francisco, Calif.,
Attorneys for Defendant and Appellant.

In the Superior Court of the State of California, in and for City and County of San Francisco.

No. 139,145.

Dept. No. 15.

S. PETTERSON,

Plaintiff,

vs.

HOBBS WALL & COMPANY,

Defendant.

(COMPLAINT.)

Plaintiff complains of the defendants and for cause of action alleges:

I.

That on all of the dates and times herein mentioned, the defendant above named was and now is a corporation organized and existing under and by virtue of the laws of the State of California, and had and now has its office and principal place of business in the city and county of San Francisco, State of California, and on all of the said dates and times, it was the owner of a certain steam vessel flying the flag of and engaged in the mer-

chant service of the United States of America, named the "Crescent City."

II.

That on or about the 27th day of February, 1922, plaintiff was in the employ of said defendant on said "Crescent City," in the capacity of second mate, at the wages of $120.00 per month, and his board and lodging, and on said day said vessel with plaintiff so on board was lying at a place called North Bend in the State of Oregon, she having gone there from the State of California with plaintiff so on board for the purpose of loading a load of lumber to be carried by her with plaintiff as such second mate to the State of California.

III.

That at the time said vessel left the said State of California she was unseaworthy and her appliances were defective, as she had an unused, what is called a block, hanging on her main mast about one hundred and ten feet above her deck, which said block had upon it a hook with which it was suspended by the [1*] said hook being hooked in an eye that was upon a band that went around said mainmast; that to make said block reasonably safe when so suspended it was necessary that there should have been what is called a nosing around the mouth of the hook, but there was no nosing or anything to act as a substitute therefor on the same, and by reason thereof the said block, which weighed in excess of 25 pounds, jarred out of said eye on the day aforesaid and fell down and struck plaintiff

*Page-number appearing at foot of page of original certified Transcript of Record.

upon his right arm below the elbow and at that place badly fractured the bones of his said right arm by reason of which plaintiff was thereupon compelled to undergo surgical treatment and has been under such ever since except for a period of 31 days and is now and for a long time to come will be under such surgical treatment, and he suffered and still and for a long time to come will suffer great physical pain and suffering from his said injuries, but to the permanency thereof he is unable at this time to state.

IV.

That the port in the State of California that said vessel "Crescent City" left for said North Bend was the port of San Pedro, and defendant carelessly and negligently sent her from said San Pedro and operated her with the said block without any nosing on it as aforesaid, the condition of said block being unknown to plaintiff and it being so suspended without any fault on his part as it was the duty of the defendant by and through the master and mate of said vessel to keep vessel and her appliances and parts in order, and not the duty of the plaintiff.

V.

That plaintiff has incurred a liability for surgical attendance and hospital fees in the treatment of his said injury the reasonable value of which is the sum of $374.00, none of which has been [2] paid but which defendant promised to pay.

VI.

That by reason of the premises plaintiff has been

damaged in the sum of ten thousand ($10,000) dollars, none of which has been paid.

WHEREFORE plaintiff prays judgment against the defendant for the sum of ten thousand ($10,000) dollars and costs of this action.

H. W. HUTTON,
Attorney for Plaintiff.

State of California,
City and County of San Francisco,—ss.

S. Petterson, being first duly sworn, deposes and says as follows: I am the plaintiff above named, I have read the foregoing complaint and I know the contents thereof, and the same is true of my own knowledge, except as to the matters therein stated on information or belief, and as to those matters I believe it to be true.

His
S. X PETTERSON.
Mark

Subscribed and sworn to before me this 28th day of August, 1923.

[Seal] JOHN L. MURPHY,
Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: Filed August 28th, 1923. H. I. Mulcrevy, Clerk. By ————, Deputy Clerk.

[Endorsed]: Filed July 14, 1924. Walter B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [3]

In the District Court of the United States in and for the Northern District of California, Southern Division.

No. 16,947.

S. PETTERSON,

Plaintiff,

vs.

HOBBS WALL & COMPANY,

Defendant.

WRIT OF CERTIORARI.

United States of America,
Northern District of California,—ss.

The President of the United States to the Superior Court of the State of California, in and for the City and County of San Francisco, GREETING:

Being informed that there is now pending before you a suit in which S. Petterson is plaintiff and Hobbs Wall & Company is defendant, numbered 139,145; that said suit was commenced by a summons and complaint in said Superior Court of the State of California, in and for the city and county of San Francisco, and that said suit has not yet been tried, and we being willing for certain reasons, that said cause and the records and papers therein should be certified by said Superior Court and removed unto our District Court of the United States, in and for the Northern District of California, Southern Division, we do hereby command

that you make return, without delay, and within thirty (30) days after service upon you of this writ to said District Court of the United States, as aforesaid, of the records and papers in said cause, so that the said [4] District Court of the United States may act thereon as of right and according to law.

WITNESS, the Honorable JOHN S. PARTRIDGE, United States District Judge, in and for the Northern District of California, this 15th day of November, 1923.

[Seal] WALTER B. MALING,
Clerk of the District Court of the United States.
By J. A. Schaertzer,
Deputy Clerk.

[Endorsed]: Filed Nov. 15, 1923. Walter B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [5]

In the District Court of the United States in and for the Northern District of California, Southern Division.

No. 16,947.

S. PETTERSON,

Plaintiff,

vs.

HOBBS WALL & COMPANY,

Defendant.

ANSWER TO COMPLAINT.

Comes now Hobbs Wall & Company, a corporation, defendant in the above-entitled matter, and for answer to plaintiff's complaint on file herein, admits, alleges and denies, as follows:

I.

Defendant admits all the allegations contained in paragraph I of said complaint and defendant further admits all the allegations in paragraph II of said complaint, except that defendant alleges that said date was the 27th day of February, 1923, and not the 27th day of February, 1922.

II.

Defendant denies that at the time said steam vessel "Crescent City" left the State of California, as alleged in said complaint, or at any other time or at all, said vessel was unseaworthy and/or her appliances were defective and/or that she had an unused block hanging on her mainmast about one hundred and ten feet above her deck, or at any other place on said mast, and in this behalf defendant alleges that said block was used for the signal halyard. Defendant further denies that to make said block reasonably safe when suspended, as alleged in said complaint, or safe at all, it was necessary that there should [6] have been what is called a "nosing" around the mouth of the hook with which such block was suspended as set forth in said complaint and defendant denies that there was no nosing and /or anything to act as a substitute therefor on the same, and in this connection

defendant alleges that there was at the time plaintiff received the injury alleged in said complaint a good and sufficient nosing around the mouth of said hook. Defendant further denies that by reason thereof, or by reason of any of the matters set forth in said complaint, or by reason of any negligence on the part of defendant, or by reason of any unseaworthiness of said vessel "Crescent City," or by reason of the lack of any proper appliances of facilities or furnishings or tackle on said vessel, the said block jarred out of the eye in which said hook was hooked, as set forth in said complaint, on said date, and/or fell down and/or struck plaintiff upon his right arm below the elbow, or upon any other part of his body, and at that place or at any other place or at all, badly or at all fractured the bones or any thereof of his right arm, and defendant denies that by reason thereof, or by reason of any matters set forth in said complaint, plaintiff was compelled to undergo surgical treatment and/or has been under such ever since, except for a period of thirty-one days, and/or is now and/or for a long time to come will be, under such surgical treatment; and defendant denies that he suffered and/or still and/or for a long time to come will suffer great or any physical pain and/or suffering from his said injuries, or at all.

III.

Defendant denies that it carelessly and/or negligently sent said vessel "Crescent City" from San Pedro or to or from any other place and/or oper-

ated her with said block without any nosing on it, as alleged in said complaint, and in this [7] connection defendant alleges that at the time defendant sent said vessel from San Pedro, and at all times thereafter, and at the time plaintiff received said injury, said block had a good and sufficient nosing on it.

Defendant further denies that the condition of said block was unknown to plaintiff and denies that said block was suspended without any fault on plaintiff's part, and denies that it was the duty of defendant to keep said vessel and her appliances and/or parts in order by and/or through the master and mate of said vessel only, and denies that it was not the duty of plaintiff to do so, and in this connection defendant alleges that it was also the duty of plaintiff, as second mate of said vessel, to see that said vessel and her appliances and parts were in order.

IV.

Defendant denies that plaintiff has incurred a liability for surgical attendance and/or hospital fees, or for anything else, in the treatment of the injury alleged in said complaint, or at all, the reasonable, or any value of which is the sum of three hundred and seventy-four dollars ($374), or any sum at all, and defendant denies that defendant promised to pay said sum or any part thereof.

V.

Defendant denies that by reason of the premises, or by reason of any of the matters set forth in said complaint, or otherwise or at all, plaintiff has

been damaged in the sum of ten thousand dollars ($10,000.00) or in any other sum whatsoever. [8]

And for a further, separate and distinct answer to said complaint, this defendant alleges:

I.

That on said date plaintiff so recklessly, carelessly and negligently operated the winch on said vessel "Crescent City" that plaintiff caused the donkey fall to get tangled around the midship guy, whereupon plaintiff, in order to clear the donkey fall from the midship guy, by slacking them up and heaving them tight again, recklessly, carelessly and negligently caused the mast on which said block was hanging to be jarred too strongly and that said block jarred out of said eye, as alleged in said complaint, and plaintiff received the injury alleged in said complaint, solely by reason of and as the direct and proximate consequence and result of said recklessness, carelessness and negligence on the part of plaintiff in operating said winch and causing said mast to be jarred too strongly, all without any fault or omission on the part of the defendant.

And for a further, separate and distinct answer to said complaint, this defendant alleges—

I.

This defendant alleges that at the time plaintiff received said injury said vessel "Crescent City" was about to sail from said port of North Bend and the loading of the cargo on said vessel was finished and completed and it was necessary simply to lower the booms to the deck from the mast, and that the

usual, customary and proper method so to lower the booms is simply to slacken the rope by which said booms are held and allow them to come down and that it is not necessary, usual [9] or proper to use the winch for that purpose and that plaintiff was not ordered or required by defendant, or by the master or by the mate of said vessel, to use said winch in lowering said booms and that plaintiff chose to use said winch as aforesaid as a whim or caprice of his own and at his peril, and in so doing was not in the course of his employment on said vessel, or otherwise, and that the injury which plaintiff received, as alleged in said complaint, was received by plaintiff solely as a result of said whim or caprice of plaintiff and was not received by plaintiff in the course of his employment on said vessel, or otherwise.

WHEREFORE, defendant prays that plaintiff may take nothing by his complaint on file herein and that defendant may be hence dismissed with its costs of suit herein.

JONES & DALL,

Attorneys for Defendant Hobbs Wall & Company, a Corporation. [10]

State of California,
City and County of San Francisco,—ss.

W. J. Hotchkiss, being first duly sworn, deposes and says: That he is an officer, to wit, the president of Hobbs Wall & Company, a corporation, the defendant in the foregoing answer, and makes this verification on behalf of said corporation; that he has read the foregoing answer and knows the con-

tents thereof and that the same is true of his own knowledge, except as to the matters therein stated on information or belief and as to those matters he believes it to be true.

W. J. HOTCHKISS.

Subscribed and sworn to before me this 14th day of February, 1924.

[Seal] H. L. LANFAR,
Notary Public.

Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: Filed Feb. 14, 1924. Walter B. Maling, Clerk. [10½]

In the District Court of the United States in and for the Northern District of California, Southern Division.

No. 16947.

S. PETTERSON,

Plaintiff,

vs.

HOBBS WALL & COMPANY,

Defendant.

STIPULATION WAIVING JURY.

It is hereby stipulated between the respective parties hereto that a jury be and the same is hereby waived in the above-entitled matter.

H. W. HUTTON,
Attorney for Plaintiff,
JONES & DALL,
Attorneys for Defendant.

[Endorsed]: Filed March 11, 1924. Walter B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [11]

In the Southern Division of the United States District Court, in and for the Northern District of California, Second Division.

No. 16,947.

S. PETTERSON,

Plaintiff,

vs.

HOBBS WALL & COMPANY,

Defendant.

JUDGMENT.

This cause having come on regularly for trial upon the 17th day of March, 1924, before the Court sitting without a jury, a trial by jury having been especially waived by written stipulation filed: H. W. Hutton, Esq., appearing as attorney for plaintiff and Messrs. Jones and Dall, appearing as attorneys for defendant; and the trial having been proceeded with and oral documentary evidence upon behalf of the respective parties having been introduced and closed and the cause, after arguments by the attorneys, having been submitted to the Court for consideration and decision, and the Court, after due deliberation, having filed its decision and ordered that judgment be entered in favor of plaintiff in the sum of $2,850.00 and for cost.

Now, therefore, by virtue of the law and by reason of the premises aforesaid, it is considered by the Court that S. Petterson, plaintiff, do have and recover of and from Hobbs Wall & Company, defendant, the sum of two thousand eight hundred fifty and 00/100 ($2,850.00), together with its costs herein expended taxed at $——.

Judgment entered April 1, 1924.

WALTER B. MALING,
Clerk. [12]

United States District Court, California.

No. 16,947.

PETTERSON

vs.

HOBBS ETC. & CO.

(OPINION OF COURT.)

Plaintiff, second mate of defendant's ship, alleges injury aboard, caused by the vessel's unseaworthiness and her negligent maintenance.

The defenses are denials of the causes alleged and allegation that the injury was wholly caused by plaintiff's negligence. The evidence is that a block suspended by a hook into an eye welded to a band at the top of the mainmast fell and struck plaintiff. He testifies the hook bore no evidences that it had ever been supplied with the usual rope or wire guard or keeper. The captain testifies that the hook did.

The circumstances related to the fall are that the hook had there hung 100 feet above deck for more

than two years, without any evidence of renewal or inspection; that the guard or keeper, if of rope, will last about two years; that the block had been used but once or twice during plaintiff's seven months' service; was 20 feet above all ratline or access save by shinning up the mast; that it was the duty of the first mate to inspect and repair, tho plaintiff had "authority" to remedy any like defects by him perceived; that he had not been up to the block; that for 3 days the vessel loaded lumber by means of cargo booms; two on the mainmast operated by hand and power winch. That, loading completed, plaintiff proceeded to lower and stow the booms; that the cargo hook of the mainmast booms caught on a guy between the booms and plaintiff vigorously, if not violently, worked the winch forward and reverse to dislodge the hook; [13] that this accomplished, the booms were hand-lowered, and when half accomplished the block fell, struck and injured the plaintiff.

It is obvious that any roll or careen of the ship will be magnified in sway or sweep of the mast tops. Hence, the necessity to supply and maintain guards or keepers on block hooks there suspended. This rolling or careening of the ship is ordinary, usual and anticipated. It is also clear that if this hook ever had a guard or keeper, it weathered and broke away at the time of fall or prior thereto. The roll and sweep of loading may have dislodged the guard or keeper, or the jar and jerk consequent upon plaintiff's manipulation of the winch may be responsible. But there is no evidence that would warrant

a finding that plaintiff's said conduct was other than usual, ordinary, necessary, reasonable; no evidence it was negligence, and none that it wholly caused the block to fall, that is, without regard to guard or keeper, absent or defective.

In these circumstances, although it is probable plaintiff's conduct or acts caused the hook to escape the eye-bolt, it precipitated the fall. Such conduct or acts, though contributing to the block's fall, in legal contemplation are not the *cause* of the block's fall but only a *condition* thereof.

The proximate cause was the absence or weakness of the guard or keeper, due to defendant's failure to discharge their duty, whether to make seaworthy with reasonable diligence to maintain.

And it is so found, if necessary to appeal to *res ipsa loquitens* that the principle applies to master and servant actions has been long since declared by this Circuit Court of Appeals. Citation not at hand. [14]

In respect to damages, plaintiff's right radius was broken, slowly repaired, required an operation; shortening it three-eighths of an inch, involving pain, lost time and as much impairment of the arm as is consequent upon that amount of shortening in an arm otherwise perfect in repair.

For lost time in the circumstances it is believed and found that $1300.00 are just compensation.

For surgical treatment, $300.00, likewise.

The evidence in respect to impairment of the arm is very general and unsatisfactory. Plaintiff's medical testimony (and defendants introduced none) is

that the arm is some "out of line," curtails strength and rotation and though the muscles will probably accommodate to the shortening, though the latter "will interfere in some kinds of manual labor." Plaintiff's vocation is supervision rather than manual labor.

In this state of evidence, having in mind the principles of compensatory damages and the circumstances of the case, it is believed and found that $1250.00 will fairly compensate the impairment and is just to both parties.

Cost to plaintiff. Judgment accordingly.

April 1, 1924.

BOURQUIN,
Judge.

[Endorsed]: Filed April 1, 1924. Walter B. Maling, Clerk. [15]

In the Southern Division of the United States District Court, in and for the Northern District of California, Second Division.

AT LAW—No. 16,947.

S. PETTERSON,

Plaintiff,

vs.

HOBBS WALL & COMPANY,

Defendant.

STIPULATION AND ORDER EXTENDING TIME TO AND INCLUDING MAY 29, 1924, TO FILE BILL OF EXCEPTIONS.

IT IS HEREBY STIPULATED AND AGREED that the defendant Hobbs Wall & Company, a corporation, may have to and including the 29th day of May, 1924, within which to make, serve and file its bill of exceptions on appeal from the judgment rendered herein on the 1st day of April, 1924, against said defendant and in favor of plaintiff.

Dated May 20, 1924.

H. W. HUTTON,
Attorney for Plaintiff.
JONES & DALL,
Attorneys for Defendant.

[Endorsed]: Filed May 21, 1924. Walter B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [16]

In the Southern Division of the United States District Court, in and for the Northern District of California, Second Division.

AT LAW—No. 16,947.

S. PETTERSON,

Plaintiff,

vs.

HOBBS WALL & COMPANY,

Defendant.

STIPULATION AND ORDER EXTENDING TIME TO AND INCLUDING MAY 21, 1924, TO FILE BILL OF EXCEPTIONS.

IT IS HEREBY STIPULATED AND AGREED that the defendant Hobbs Wall & Company, a corporation, may have to and including the 21st day of May, 1924, within which to make, serve and file its bill of exceptions on appeal from the judgment rendered herein on the 1st day of April, 1924, against said defendant and in favor of plaintiff.

Dated May 3d, 1924.

H. W. HUTTON,
Attorney for Plaintiff.
JONES & DALL,
Attorneys for Defendant.

In accordance with the foregoing it is so ordered. May 5, 1924.

FRANK H. KERRIGAN,
District Judge.

[Endorsed]: Filed May 5, 1924. Walter B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [17]

In the Southern Division of the United States District Court, in and for the Northern District of California, Second Division.

AT LAW—No. 16,947.

S. PETTERSON,

Plaintiff,

vs.

HOBBS WALL & COMPANY,

Defendant.

STIPULATION AND ORDER EXTENDING TIME TO AND INCLUDING JUNE 9, 1924, TO FILE BILL OF EXCEPTIONS.

IT IS HEREBY STIPULATED AND AGREED that the defendant Hobbs Wall and Company, a corporation, may have to and including the 9th day of June, 1924, within which to make, serve and file its bill of exceptions on appeal from the judgment rendered herein on the 1st day of April, 1924, against said defendant and in favor of plaintiff.

Dated May 28th, 1924.

H. W. HUTTON,
Attorney for Plaintiff.
JONES & DALL,
Attorneys for Defendant.

In accordance with the foregoing it is so ordered.

PARTRIDGE,
Judge.

[Endorsed]: Filed May 28th, 1924. Walter B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [18]

In the Southern Division of the United States District Court, in and for the Northern District of California, Second Division.

AT LAW—No. 16,947.

S. PETTERSON,

Plaintiff,

vs.

HOBBS WALL & COMPANY,

Defendant.

STIPULATION AND ORDER EXTENDING TIME TO AND INCLUDING JUNE 30, 1924, TO FILE BILL OF EXCEPTIONS.

IT IS HEREBY STIPULATED AND AGREED that the defendant Hobbs Wall & Company, a corporation, may have to and including the 30th day of June, 1924, within which to make, serve and file its bill of exceptions on appeal from the judgment rendered herein on the 1st day of April, 1924, against said defendant and in favor of plaintiff.

Dated June 9th, 1924.

H. W. HUTTON,
Attorney for Plaintiff.
JONES & DALL,
Attorneys for Defendant.

In accordance with the foregoing it is so ordered.

KERRIGAN,
District Judge.

[Endorsed]: Filed June 9, 1924. Walter B. Maling, Clerk. [19]

In the Southern Division of the District Court of the United States, in and for the Northern District of California, Second Division.

AT LAW—No. 16,947.

S. PETTERSON,

Plaintiff,

vs.

HOBBS WALL & COMPANY,

Defendant.

DEFENDANT'S BILL OF EXCEPTIONS.

This action came on regularly for trial before the above-entitled court, without a jury on the 27th day of March, 1924. H. W. Hutton, Esq., appearing as attorney for plaintiff, and Messrs. Jones & Dall, by C. G. Dall, Esquire, appearing as attorneys for the defendant, and the following proceedings and none other were had.

Plaintiff thereupon called the following witnesses and offered the following testimony, to wit:

TESTIMONY OF JOSEPH F. POHEIM, FOR PLAINTIFF.

JOSEPH F. POHEIM, called as a witness on behalf of the plaintiff, was duly sworn and testified as follows:

Direct Examination.

I am a physician and surgeon practicing in San Francisco since 1898; I am a graduate of one university and have studied in other universities on the continent, Berlin and Vienna.

I know Petterson, the plaintiff in this case. He came under my care about May 11, 1923. I made an examination of him at that time and had some X-rays taken of his arm. He had a cast on his arm at that time and told me that it was being treated for a fracture that had been received up north. The X-rays showed a complete fracture of the radius, a fracture of the radius bone.

Two of these X-rays were thereupon offered and received [20] in evidence and marked Plaintiff's Exhibits Nos. 1 and 2.

At the time he came to me the fracture was between eight and ten weeks old. When he first came to me I could not definitely say what the condition of the fracture was, except that I noticed that the union of the bone was out of line at that time; he had had a cast put on it up north and then he had come down here and gone to the Marine Hospital and had another cast put on, and the patient, as I understand it, had complained that nothing further had been done, and he finally came

(Testimony of Joseph F. Poheim.)

to me, with the consent of Mr. Meyer, of Hobbs, Wall & Co. I then took over the case, having communicated with Mr. Meyer, first asking him if he was satisfied I should take over the case, and he told me to go ahead. I then removed the cast, after taking an X-ray, and in that the bones were in fair condition apparently, from the picture, and had a leather cast made, I might call it, a leather bandage made to hold the arm in position, and to free him from the heavy cast. This was put on the patient's arm for about, I should judge, two or three weeks, and after three weeks in the usual course of events, I concluded to attempt to make passive motion of the arm.

When he came to me I could not tell whether there was any union. The picture showed there was possible union, but you could not tell until you had moved the arm whether there was a complete union, and the trouble with it afterwards was only discovered through, I might say, a fluke. It was afterwards discovered there was a fibrous union. As I started passive motion, the patient felt a click between the two bones, as he thought; I did not believe that was possible, and thought probably the bone was healing, but examined it, and I felt the click. As soon as I felt the click I immediately suspected the possibility of only a fibrous union, and not a bony union, so that the two ends were [21] not connected by a solid bony formation. I immediately, therefore, took him into the X-ray room and put what is known as a fluoroscope on

(Testimony of Joseph F. Poheim.)

him, did not take a picture, and then attempted to make the motion in the direction that I felt the click, and in making the motion in the direction that I felt the click, and looked through the fluoroscope, I then discovered what the real trouble was, and the picture will show what that was.

Here is the picture of the bone which was taken after I had discovered what was the trouble with the bone. It moved completely out of line which you can notice from the picture. The picture was taken 8–1–23. The trouble was that the union of the bone was simply a fibrous union. The bone was turned one way; it was completely out of line. The two ends were partially in contact, but it was a fibrous union, not a bone union. In other words, they were moving on themselves, a false joint.

This X-ray was thereupon offered and received in evidence and marked Plaintiff's Exhibit No. 3.

When I discovered what was the trouble with the man's arm, I reported the matter back to Mr. Meyer of Hobbs, Wall, & Company. I told him that the bone never could be treated in any other way with the exception of operating on it and making a recision, cut through the arm and bring them tobether, in close apposition. I suggested wiring them.

Mr. Meyer called in a Dr. Ryan, who looked at the arm and suggested to him that the arm be put again in a cast to see if it might not be possible to get a union. Mr. Meyer wrote me and told me of what Dr. Ryan had suggested, and I then advised

(Testimony of Joseph F. Poheim.)

Mr. Petterson to follow out Mr. Meyer and Dr. Ryan's suggestion, and that there was no reason why we should not try it. Petterson finally consented to put it in a cast again, which I did, and he [22] went to sea and came back in thirty days and I again removed the cast and took a fluoroscope picture of it again and found that the condition had not been altered; that it was exactly the same as it was before, and I told him then that my opinion still held; that the only thing to do with it was to operate on the arm.

I then advised Captain Petterson again to be operated on, and finally, about the 15th or 16th of August, I operated on him at the Morton Hospital. He was under an anaesthetic for about an hour and a half. The nature of the operation was that I cut down on the bone, removed the fibrous tissue and found the condition exactly as it was in the X-ray. I freshened and leveled off the ends, thereby necessarily shortening them, and brought the freshened ends together by wire. It is a very beautiful result. The wires are in his arm now. This is a picture showing the condition after the operation.

This X-ray was thereupon offered and received in evidence.

He has a perfect arm to-day, but it is short on one side. Necessarily the bringing together of the bone from the cutting of the end would and naturally brought about a shortening. That has some effect on the use of the arm, that is, it puts

(Testimony of Joseph F. Poheim.)

the whole hand and arm out of line, and necessarily will curtail the strength in the action of it. It will also decrease the power of the hand. Probably that is permanent. In my judgment his right arm will never be normal on account of its being out of line. The operation which I made was the only possible way of getting the bone to form a union. My charge for the operation and subsequent treatment for practically eight weeks was $300.00. I also was paid $175.00 for the treatment of Petterson up to the time of the operation. This was paid to me by Hobbs, Wall & Company. The [23] $300.00 charge was a separate item for the operation and subsequent treatment.

It was thereupon agreed that Hobbs, Wall & Company had authorized Dr. Poheim to go ahead and perform the operation which was performed.

The treatment which I gave to Mr. Petterson occasioned him pain and physical suffering. Going around with his arm in a plaster cast caused him suffering at times and caused him inconvenience all the time.

Cross-examination.

The charge of $300.00 for the operation is a reasonable charge, and I did not have in mind that possibly the corporation, defendant in this case, might be paying it.

After the operation I saw Petterson the first ten days twice a day. The charge is not only reasonable, but I think it is cheap.

When the bone had to be cut naturally it short-

(Testimony of Joseph F. Poheim.)

ened; every muscle that he pulls does not pull in a straight line, but pulls on an angle. In other words, the whole arm is out of line from what nature had intended it to be. The shortness of the radius is caused by the removal of the bone. There is easily three-eighths of an inch that was removed and that is the quantity by which the radius is shorter than it was in its former condition. It distorts the whole forearm to that extent.

As far as my medical teachings are concerned, it is possible and probable that these muscles would accommodate themselves to that condition, that nature will provide for drawing up these muscles so that the motion will be rectified but the fact that all of these tendons coming from the muscles are bound [24] in by ligaments, and that these ligaments have not been disturbed, and where ordinarily the finger, when it would close, would work straight through, being off this way, just a little on an angle this way and then down, that will unquestionably interfere with the action to the same extent that it would in a straight line; in other words, if you are pulling a cord from an angle you are not going to have the same pull as you are in a straight line, with no resistance. In order to accomplish the same result you will have to use more muscular force than before, but you have no right to expect in the ordinary run that you are going to get more muscle; you have a tendency to have atrophy through a long lack of use of the arm. The fact that he requires more strain to accomplish

(Testimony of Joseph F. Poheim.)

a certain result will develop the muscle, but it will not develop it more than nature will permit, and he still has the off-line no matter how well his muscle develops. It is not true that an over-development of the muscle will permit him to have the same normal ordinary motion that he had before. He probably is fully developed to-day, a very powerful man who has all the development he will ever get; looking at his arm, he is a man that had his muscles developed to the fullest possible extent to-day, and he is never going to get an increase as a result of it, but a decrease.

He can accomplish the normal motion of that hand by imposing a greater effort, if he has power to do it. The only thing he does lose are the extraordinarily severe exertions that he might desire to make with that hand; the ordinary motions he could make.

Q. You stated he had a perfect arm to-day, in reply to counsel?

A. Yes, there are probably few like it, as a result [25] of the operation.

I could not tell whether the fact that the bones, when I saw them in the X-ray, were out of line was due to improper treatment he had previously received after the accident. If he had been brought to me immediately after the accident, I believe I could have achieved a bony union and avoided the necessity of this operation, but it is only theory; no man could swear to it; I believe I could have done it because I never had a failure. I never had a

(Testimony of Joseph F. Poheim.)

fibrous union in practice. A fibrous union is something which the doctors seek to avoid; it is an unfortunate occurrence, and we do not understand why it happens; it is unusual, it seldom happens.

Normally you can take an ordinary bone and you will have the beginning of a proper union in two weeks. I don't think there ever was a bony union before the operation, because when we went in we found a soft fibrous union. We had it in the absolute anatomical specimen.

Redirect Examination.

When he came to me it was still in a cast, and he made the complaint that he had been up in Seattle and came down here. Oftentimes we attempted, rather than to disturbe the union again, to take our chances that the union will go on as it is; in other words, it is always a good idea, even in medicine, to not try to do too much for patients; you may bring on much more trouble than you originally looked for, and so the theory was, here, and also I believe at the Marine Hospital they took the same view, that if we could get a union we will first try it with the condition of the bone as it was before attempting to go to the major operation, which is at all times a very dangerous thing, with the possibility of losing an arm. [26]

Q. In the condition of his arm, would it be likely to interfere with his performance of manual labor?

A. To what extent, of course, is a question, but unquestionably it is not as strong as it was before,

(Testimony of Joseph F. Poheim.)

but I will say this, the man has some strength in his arm and hand; he is not a cripple.

Q. It is not normal?

A. It is not normal; no.

Q. The fact then that it is not normal, then would that not be likely to interfere with his performance of manual labor?

A. Yes, certain kinds of manual labor.

TESTIMONY OF R. E. HAGGARD, FOR PLAINTIFF.

R. E. HAGGARD, called as a witness on behalf of the plaintiff, was duly sworn and testified as follows:

Direct Examination.

I hold with the Industrial Accident Commission the position of superintendent of permanent disability, rate department, and have been such since February, 1919. As such I am called upon to examine people who have received injuries. We have a gripping machine, called a dynamometer, for testing the strength of arms and hands. The Industrial Accident Commission has a regular schedule, with supplemental rules and notes used for fixing the percentage of permanent partial disability.

Q. This man Petterson, the plaintiff in this case, has he ever been to your place to be examined, to have his arm examined by you?

Mr. DALL.—If your Honor please, we interpose the objection on the ground it is immaterial, irrelevant and incompetent. The workmen's com-

(Testimony of R. E. Haggard.)

pensation law of the State of California does not apply to this injury. [27]

Mr. HUTTON.—I am only trying, if your Honor please, to show just the character of this man's injury from what this witness observed, in addition to what the doctor testified.

The COURT.—I will hear it. If not competent or material the Court will give it no consideration in making up its decision. The objection will be overruled for the sake of the record and an exception noted.

EXCEPTION No. 1.

Mr. HUTTON.—Q. He has been to you, has he not? A. I saw him yesterday morning.

Q. You saw him before that, too, did you?

A. I have no definite recollection.

Q. What test did you put his arm and hand under yesterday, or did you put it under any test?

Mr. DALL.—One moment, may my objection be considered as going to all of this line of examination?

The COURT.—Yes, all of this character of testimony, with an exception noted.

EXCEPTION No. 2.

A. I tested him out on the gripping machine, to find out what the grasp in the injured hand was in relation to the grasp and power in the uninjured hand.

Mr. HUTTON.—Q. Did you find any difference in the two hands.

A. I found that on the injured hand the grasping

(Testimony of R. E. Haggard.)

power tested 50 pounds; in the uninjured hand 140 pounds.

Q. Did you observe the alignment of his arm?

A. I did not; no.

Q. Did you make any physical examination other than that of his hand and arm? [28]

A. The only examination I made was with regard to the grasping power.

Q. Is that the only examination you made with the gripping machine? A. Yes.

Q. Did you make a full and careful examination of it? A. Of the arm?

Q. Yes. Did you do anything further than the test with the gripping machine? A. No.

Cross-examination.

That machine is a mechanical arrangement that tests the power of the grip. It registers the pressure of the grip that is exerted against it. It depends of course, entirely on the force that is put into the grip. There is no way of ascertaining whether that is the full extent of the grip or whether it is only partial. You have to rely upon the good faith of the subject and your experience in testing out to determine whether in your own mind the man is putting effort into it. It is entirely possible that this man would exert a pressure of 50 pounds with his right hand, whereas if he had been anxious to register more highly he could have done so by exerting a greater pressure.

TESTIMONY OF S. PETTERSON, IN HIS OWN BEHALF.

S. PETTERSON, called as witness on behalf of the plaintiff, was duly sworn and testified as follows:

Direct Examination.

I am the plaintiff in this case. I am forty-seven years of age and have been going to sea since I was fourteen. I was on the steamer "Crescent City" in 1922 and 1923 for a period of about seven months. I was second officer on her. My salary first was $120.00 per month, and in a few months I got raised to [29] $130.00 per month. This included board and lodging.

I was on her up in North Bend in February, 1923. We were loading lumber on her to take to San Pedro.

The officer above me is the first mate and above him the captain. We didn't carry any third mate. There were eight sailors besides engineers and firemen.

After the vessel had been loaded with lumber the first mate went ashore and he told me to make the ship ready for sea. In making the ship ready for sea I had to lower the cargo booms of which there were four. They were situated on masts. There were two masts and two booms on each mast. The captain was ashore, too.

We lowered the forward gear down first. Then we started to lower the gear on the mainmast. The booms were about 46 feet long, I believe. One

(Testimony of S. Petterson.)

end of the boom sets in a band around the mast; the other end is suspended with halyards. The halyards are suspended from blocks flying from the masts. When you want to lower the booms the first thing you do is to go to the halyards, which is what I did on this occasion. The men handled the halyards. There were four men on each side. While we were working that a block come down—came down from a little below the truck of the mast. The mast is somewhere around 110 feet high. The block had nothing to do with the booms. I don't know what the block was there for. I believe that it had been there when the ship was carrying wireless before, to have wireless gear hoisted up there, I believe; that is the way it looked to me. The block was not used for any purpose while I was on the ship except it was used once for painting the mast. In order to scale the mast there are what are called ratlins, which are steps. The ratlins go to the first shoulder of the mast. The block was about 20 feet above these ratlins There was no way of getting up [30] to where the block was except by shinning up the mast.

The block which came down struck me on my right lower arm. It was a 6-inch block, like the one you are showing me. I think it weighs around 4½ or 5 pounds. The block struck me about the middle of the wrist. This block was hooked in an eye-bolt on a band around the mast. It was a block in every way like the one now being shown to me.

(Testimony of S. Petterson.)

Thereupon the block which plaintiff's counsel had shown to the witness was offered and received in evidence.

On board ships in order to prevent blocks from jarring out they are supposed to put a nosing around them. That is a nosing that goes around the end of the block and this way. (Witness illustrating how nosing goes around end of block.) It can *never. That* is commonly done when they have blocks hanging up at any height. *come unhooked then.* The purpose of the nosing is to prevent the block from unhooking.

Q. Was there any nosing on the block when it came down and struck you? You say you picked it up. A. Yes, I did.

Q. Was there any indication on it as to whether there was any nosing on it or not?

A. No, I never knew there was any nosing on it.

Q. There was not any? A. No.

Q. Could you tell by looking at it at that time whether there had been any nosing on it?

A. It always shows.

Q. I ask you whether you could see, yes, or no?

A. Yes.

Q. How could you tell?

A. Because it shows a mark on the neck of the block [31] after the block has been painted.

Q. You say there had not been any nosing on that block? A. No.

The mate was not on board when it happened. He was aboard about ten or fifteen minutes after-

(Testimony of S. Petterson.)

wards, something like that. The booms were suspended by falls to the mast. These falls were on the mast about 20 or 25 feet below where this block was hung, something like that.

The block broke the bone in my arm. My arm started to swell up. When the captain came on board he gave me a hospital receipt to go up and see the doctor in the hospital in North Bend, which I did. They examined my arm and took an X-ray and told me to stay there. I stayed there for sixteen days; then I came down to San Francisco on the steam schooner "Mary Hanify." Then I went to the Marine Hospital, 14th Avenue and Lake Street, San Francisco. My arm was in a plaster cast. They took the cast off and examined my arm and put the splint on it on the inside. I went back there the next day and then they kept me in the hospital for a little less than a month. Then I became what they called an outside patient at the Marine Hospital and reported once or twice a week. In the meantime I was living at a place where I used to room. My arm did not get better; I complained to Mr. Meyer of Hobbs, Wall & Company about it; he told me to go to a private doctor, and so I went to Dr. Poheim. When Dr. Poheim said I had to have my arm operated on Mr. Meyer sent me to another doctor. He told me to prevent the operation, to have the arm put in a cast for thirty days, which I did. Then the arm got better. During that month I worked on board the "Crescent City"; I stood a watch; all I had to do was stand

(Testimony of S. Petterson.)

up and look out for the steering-gear. I also helped along as much as I could in port with one arm. That was in July. Then in July when I came back I went up [32] to the doctor's and he found the arm in the same condition as it was before he put the cast on it, and Mr. Meyer told me to go to Dr. Ryan again and see what he said. He told me the same thing, and he got a report, and sent it down to Hobbs Wall that it was absolutely necessary to have the arm operated on. I was operated on and was first able to go to work again on the 20th day of February, 1924, eleven months and twenty days after the accident. I worked one month in the interim.

My arm does affect me now, because I can't do the proper work I should do; I have not got the strength in it; I cannot turn it properly; I can't turn it over this way unless I hold it this way, and when I hold it that way, then I can turn it a little; if I have it this way I can't turn it any more than this. I am right-handed. I went to work on the 20th of February on the "Sea Foam." My arm down in the wrist affected me in the performance of my work, because the bone was thrown out a whole lot right here, being crooked.

I was up in the Industrial Accident Commission yesterday. When I tried those tests on that gripping machine apparatus I did the best I could; he tried me twice.

On board a vessel like the "Crescent City" the first mate inspects the different parts of it and takes care of the overhauling; that is what happens on all

(Testimony of S. Petterson.)

ships. Any repairing always belongs to the owners. As to repairing gears and so on, the first mate does that. The second mate on board a vessel does as the first mate and captain tell him to do; he is supposed to report if he sees anything wrong, or anything like that, which I did report, but the mate is the man that makes inspections and takes care of the general gear of the vessel.

When I came out of the Marine Hospital I lived at 366 Clipper Street; my board and lodging cost me about $3.00 a day. I left the Marine Hospital about the 19th day of April, 1923. [33] From that time up to the time I went to work in February, 1924, I paid for my own board, except for the one month that I worked with the plaster cast on my arm. I suffered pain from the injury; I was in the Marine Hospital with 30 pounds of weight hung on my arm for seventeen days.

I had never been up to where the block was on the mast; there was a block on the foremast, but not a block like this. It is not usual to have a block like that hanging on the foremast.

Cross-examination.

The block which fell on my arm was not on the foremast—it was on the mainmast. This block was hanging on the mainmast when I came aboard the ship; I had seen it. The block had been used for painting the mast.

Q. Did you observe whether it had a nosing on it or not? A. No.

(Testimony of S. Petterson.)

Q. You said that it was the duty of the first mate to keep the gear in repair. Do you call such a simple matter as tying a string around a hook a repair?

A. It is supposed to be done with wire, not with string, but with wire.

Q. Is it not customary to use a line? A. No.

Q. What they call yarn?

A. What they call rope yarn, yes.

Mr. HUTTON.—Do you mean rope yarn and wire, both? A. Yes.

Q. You had never observed that the nosing was missing from that block, had you? A. No.

Q. If you had you would have had authority to have it restored, would you not?

A. I would. The captain of the "Mary Hanify" gave me free passage down; I did not draw any wages on that trip, but I did get paid for some work after I got into San Pedro. I also did a month's work on the "Crescent City" which I got paid for at the rate of $130.00 per month.

Besides standing watch, the second officer navigates the ship, that is takes the bearings, reads the logs, lays out positions, etc. [34]

My work is really not manual work; it is superintending the work of the sailors.

Q. Did you ever observe that this block had been used for a signal halyard? A. Yes.

Q. On the "Crescent City," this particular block?

A. They used it once laying in "Crescent City"; I

(Testimony of S. Petterson.)

do believe we were laying in "Crescent City" when the captain wanted to dress the ship with all flags.

Q. On that day you did use it? A. Yes.

Q. Another time you used it for painting the mast? A. Yes.

Q. You said that after the accident you picked the block up? A. Yes.

Q. What did you do with the block?

A. I laid it on the rail alongside of the winch.

Q. Did you look at it to see whether it showed the signs of nosing, or not?

A. I did not look at it in particular for that. I picked it up and looked at it, and I says to myself, "There should have been a nosing around that block."

Q. You said that to yourself? A. Yes.

Q. You did not say that to anybody else?

A. No.

Q. If there had been a nosing around that block you could have observed it by looking at it, could you? A. Yes. [35]

Q. That is, there would be marks on the hook and on the flanges, here, would there not? A. Yes.

Q. That is, marks where the cord or this rope yarn would have been wrapped around? A. Yes.

Q. Do you recognize that, Mr. Petterson, as the block which struck you?

A. I could not swear if it was the same block; it was a block like that.

Q. Very similar to that?

(Testimony of S. Petterson.)

A. Something like this.

Q. But you cannot identify that as the block that struck you?

A. No, I could not swear to it.

Mr. DALL.—I ask that this be marked at this time for identification as Defendant's Exhibit No. 8.

Q. Now, looking at this block, and assuming for the question that that is the block that struck you, can you observe any marks of a nosing having been on that block?

A. There is a mark there and a mark here.

Q. Where the nosing would have been wrapped around?

A. Yes; it might be that there has been such a thing as a nosing on that block and that nosing has been torn out by hanging up there and swinging.

Q. That is possible, that the nosing could tear out?

A. Yes, but it is supposed to be looked after. When this accident occurred we were lying at North Bend, just having completed the loading of the vessel. We had been at North Bend three or four days, having come up from San Pedro. We had fine weather coming up from San Pedro, I believe; maybe it [36] was a little rough; I have no recollection as to the weather on that trip.

The two booms which attach to this mast are used for the purpose of loading cargoes of lumber. The load is hoisted by drawing on a cable which runs from the winch to the boom, out the boom and through a block and down to below. In that process of loading the steam winch is used and it results in

(Testimony of S. Petterson.)

shaking the mast of the vessel more or less. With a heavy load there is a very severe shaking of the mast. At the time of the accident this process of loading had been going on for three or four days.

The "Crescent City" carries somewhere around 500,000 or 600,000 feet of lumber. Half of that cargo is handled by the mainmast boom.

There is a separate winch for each mast. I operated the winch to draw the line up to get the hook up in the air and out of the way. Very often a hook becomes entangled with the midship guy that holds the two booms together. I don't remember that on this occasion when I hoisted the hook it became entangled with the midship guy. If it had become entangled that would not have anything to do with lowering the booms. I did not use the winch in an effort to jerk the lines loose. I used the winch to steady the booms. You are not supposed to shake the hook loose. It is not a fact that at this time I tried to shake the hook loose. I used the winch to heave the cargo hook up. * * * We always used the winch to take the hook out of the way. After I had done that I did not do anything with the winch; I did not touch the winch. It was not just after I had run this winch that the block came down and struck me on the forearm, because I am used to running winches. I was even heaving cargo when the winch-driver quit. I took his place until another man came down, heaving cargo in and out. I am used to these winches.

(Testimony of S. Petterson.)

Maybe I remember a man named Delquist, who was a member of the crew. I don't hardly know the names of these men. I remember some sailor said he wanted to go aloft and I told him, "No, it is not necessary, because the hook is not used." It would [37] not be necessary for anybody to go aloft and try to clear anything, because when the boom was subsequently lowered you could clear the entanglement on the deck. It is also possible to clear it by sending a man aloft. I don't remember saying to Delquist that I would jerk it loose with the winch.

I am not doing anything right now. A great many lumber schooners are laid up at present.

Redirect Examination.

The block that was up on the other end of the mast was not used in raising and lowering these booms on that day or at any time and had no connection at all with raising and lowering these booms. When the vessel was at sea she pitched sometimes, depending on how the weather was; that has tendency to swing a block like that upon the top of the mast. When you are hoisting a load of lumber the mast shakes a little; it shakes more or less. In lowering the booms as we lowered them that day, or in raising them, sometimes parts do get tangled, but most of the time you get along without trouble lowering and hoisting them. We got the lumber aboard in sling-loads. I do not know how much a sling-load weighs; it would depend on what kind of lum-

(Testimony of S. Petterson.)

ber it was; if it was heavy lumber it might weigh a ton. They are raised from the end of the boom; a fall goes up to the mast and that causes the mast to shake, more or less.

Thereupon plaintiff rested.

Defendant thereupon called the following witnesses and offered the following testimony, to wit:

TESTIMONY OF S. SORENSON, FOR DEFENDANT.

S. SORENSON, called as witness on behalf of the defendant, was duly sworn and testified as follows: [38]

Direct Examination.

I am an able-bodied seaman, and at present am on board the "South Coast." In February, 1923, I was a sailor on board the "Crescent City" when it was lying at North Bend. I remember the occurrence when a block from the mainmast of the "Crescent City" fell and struck the forearm of Mr. Petterson, the plaintiff in this case; I was present on that occasion and saw what happened. [39]

I joined the vessel at San Francisco on her trip north from San Pedro to North Bend. We did not have any bad weather from San Francisco to North Bend; we had an average weather, not much wind or weather.

We loaded lumber at North Bend for four days. At the time of the accident the loading had been completed. After the ship was loaded we put on

(Testimony of S. Sorenson.)

the deck lashings and put on so-called turnbuckles lashing the deckload. I was a member of the group that was working with Mr. Petterson, under his direction. The sailors at that time were lowering the booms. After the booms on the forward mast had been lowered, we proceeded to lower the booms on the after mast.

Q. Did you observe Mr. Petterson using the winch on that vessel? A. Yes.

Q. At that time? A. Yes.

Q. Describe to us just what he did with the winch.

A. He went and took the levers in his hand—that is, a so-called friction winch—and when we lowered the gear Mr. Petterson was on the lever while we lowered the booms down.

Q. What did he do? Did he pull the lines up to the top, the hook up?

A. No, the hook was already there.

Q. The COURT.—What hook is that?

A. The hook between the two donkey-falls that we use to hook on the loads and bring them aboard the ship.

Q. Above the end of the boom?

A. On each end of the boom.

Q. Was this cargo hook above the end of the boom?

A. Yes, that was hooked on the midship guy. [40]

Mr. DALL.—Q. That is it was hooked on the midship guy? A. The winch-driver left it there.

Q. It was entangled with the midship guy?

(Testimony of S. Sorenson.)

A. Yes, hooked on.

Q. Was any attempt made to release that entanglement?

A. In order to unhook it, a man could go up there and walk over and unhook it.

Q. What was done on this particular occasion?

A. Mr. Petterson took the levers and he jerked it from one side to the other and it unhooked.

Q. He shook it until it unhooked?

A. Yes, from side to the other.

Q. In doing that, did he shake the mast?

A. Yes.

Mr. HUTTON.—That is leading.

Mr. DALL.—Let me ask it the other way: What effect on that mast did the running of the winch have in the attempt to jerk that line loose?

A. It shakes the mast to the same extent that it will in loading and unloading the ship.

The block came down after we started to lower the booms. After the hook is on deck we hook it in the deckload, and then there was one man on each side of the mast lowering the gear, that is, slacking on the yards; and there was one man slacking on the guys and one man taking in the slack on the midship guy. The boom was brought down to the deck so that it would lie parallel to the length of the ship. The accident occurred to Mr. Petterson when the booms were halfway down between the place where their gear was loading and unloading and the deckload. In lowering the [41] boom you do not detach the end that sets into the mast; only one

(Testimony of S. Sorenson.)

end is lowered. During my services on the vessel I had no occasion to use this block on the mast.

Q. Did Mr. Petterson say anything about the block at the time the accident happened?

A. Mr. HUTTON.—Objected to as leading.

The COURT.—That is true, but it is only preliminary; answer "Yes" or "No." A. No.

Cross-examination.

You lower the booms by the tackle and that always causes the mast to shake, just the same as when you are hoisting cargo, that causes the mast to shake at times it shakes considerably. The booms on the "Crescent City" are probably 60 feet long. Each load weighs a ton, and in hoisting a ton weight on a boom it is bound to shake the thing that it is suspended to. This goes on all the time on board ship. We were lowering the booms in the proper manner at the time the block came down, just the same as they were always in the habit of being lowered.

Redirect Examination.

Mr. Delquist was in the rigging at the time there was this entanglement in the line. I didn't hear Mr. Petterson say anything to him at that time, but I saw Mr. Delquist; he was part ways up the rigging to unhook the hook when it entangled with the amidship guy. He did not go up to untangle it; by the time he was up a couple of steps in the rigging the hook untangled by pulling from side to the other.

Recross-examination.

The captain was up in the office on the wharf; I

(Testimony of S. Sorenson.)

cannot say exactly where the mate was. I saw the mate when the captain [42] came down for the office, which was about ten or fifteen minutes after the thing happened; that is the first time I saw the mate after the thing happened.

TESTIMONY OF E. B. BUTZING, FOR DEFENDANT.

E. B. BUTZING, called as witness on behalf of the defendant, was duly sworn and testified as follows:

Direct Examination.

I am master of the "Crescent City" and was such in February, 1923, while she was lying loading at North Bend. I remember when this accident occurred to Mr. Petterson I was not on board at the time but did come on board shortly after the accident. I was only about ten minutes away from the ship. When I came aboard, Mr. Petterson picked up the block and he told me that the block came down from the masthead and struck him on his arm. This is the block to which he referred.

This block was thereupon offered and received in evidence as Defendant's Exhibit No. 8.

It is customary with a block like this to put a nosing around it. The nosing is usually made of cord or marlin or rope yarn; they very seldom put wire on it.

I can tell by looking at that particular block that there was nosing around it because it is not painted

(Testimony of E. B. Butzing.)

in the place where the nosing has been, whereas the rest of the block is painted.

This block was used in painting the mast a few months before it came down in February, 1923. It was also used for a signal halyard.

No one at any time reported to me that there was no nosing around this block. If there had been a nosing there it is possible for it to have been broken off by the severe vibration of the mast, such as would occur in loading or from the shaking of the mast with the steam winch; a heavy sea might also do it, but this does not happen very often. This mast had been in use for three or four days in loading and had been vibrating [43] during all this period. Such vibration might have affected or broken the nosing. I have never seen that happen, but it is liable to.

A block is hooked on to the band around the mast so that even if there were no nosing it would take a considerable shake to shake it out. At the time of this accident we had on board the proper material with which a nosing might have been placed on this hook. It was within the province and charge of the second mate to put such a nosing there if he saw it was missing.

Cross-examination.

That block is not the usual signal halyard block; they are much smaller sized. A piece of marlin as nosing around that block would not necessarily rot in a short time with the sun and weather; it might last a couple of years. The sun has effect on manila

(Testimony of E. B. Butzing.)

fibre the same as on anything else; marlin has tar on it also. In heavy rolling the block would roll from side to side. I am not prepared to say that it would not roll over on the marlin [44] and chafe it. I don't think the block would shake up and down unless the hook is very slack. The mast rolls considerably, when you are loading and unloading cargo.

I am sure that this particular block just introduced in evidence is the block which hit Mr. Petterson. Mr. Petterson showed it to me when I came aboard, and then I took it and put it in the locker and it has been there ever since. Everybody that goes on board the boat has access to that locker. I am sure it is the same block. I next went to the locker and looked at the block a couple of days later, when we got down to San Pedro; I left the block right there where it was; I took it out of the locker a few days ago and brought it over to this side; the boat is on the other side.

The block was on a band around the mast. I never shinned up the mast to look at it. The work that was done when it comes to repairing anything was supervised by the mate; he tells the men what to do. If the mate isn't there and the second mate is there, he has full charge of it also.

When the boat is laid up we have more time than we need to do repairs; when we are carrying lumber we don't have any except to load the lumber and unload; as soon as we get the lumber off, we start right off again; as soon as we get loaded we start

(Testimony of E. B. Butzing.)

out. It is not true that we do not repair except when we send the boat over to the shipyards; it is not necessary to repair a block at the shipyard; we repair the blocks if they get worn out at any time at any port.

The eye is fastened to the band in this way. (Witness illustrating.) The eye is riveted in the band, welded together in one piece; the eye stands perpendicularly; when the ship rolls the block would roll also; it is fastened on the side of the mast. [45]

TESTIMONY OF THOMAS SELFRIDGE, FOR DEFENDANT.

THOMAS SELFRIDGE, called as a witness on behalf of the defendant, was duly sworn and testified as follows:

Direct Examination.

I am the chief engineer of the "Crescent City" and was such in February,1923, while she was lying at North Bend. I recall the occasion on which Mr. Petterson met with an accident. After he returned from having his arm dressed, I asked him how it happened and he told me that he was running the winch and that the block fell from aloft and fell on his arm.

At the time of the injury I was in my room, which is roughly thirty feet from the after mast; I was writing a letter.

Q. Did you or did you not observe the operation of the winch at that time?

(Testimony of Thomas Selfridge.)

A. I observed that there was considerable jarring and I was surprised at it, because the cargo was all in, as I understood it, and I could not understand why there was considerable jarring of the mast at that time.

Mr. HUTTON.—His understanding hasn't anything to do with it. He can testify there was considerable jarring, but I don't think he is competent to say anything further.

Mr. DALL.—Q. The loading had been completed at the time? A. Yes.

Q. Will you describe the manner in which the winch was operating, as to the effect that it had on the vessel?

Mr. HUTTON.—I submit, your Honor please, this witness is incompetent to testify on that; he says he was in his room writing a letter.

The COURT.—If he can he may endeavor to do so; how much weight will be given to it is another question. He may answer if he can. [46]

A. Well, I may say, I would know by experience by being in my room, I am never where the winch is being worked, but I can tell by the sound, by the violence with which it is worked.

Mr. DALL.—Q. Using your experience, describe to us how the winch was being operated at the time.

A. I will say it was being worked very violently, and I might add that I heard Mr. Petterson at that time, 30 feet away swear; I heard him at that distance; he was mad at something, I don't know what.

(Testimony of Thomas Selfridge.)

Q. The vibration that you observed, was it the same or was it more than would be caused by merely taking up the slack on the line?

A. Considerably more.

Mr. HUTTON.—I object to that on the ground it is without foundation; it has not been shown that this witness has ever seen anything of that kind done before.

I had been chief engineer of this vessel at that time for a couple of months. I had spent about thirteen or fourteen years on similar vessels as chief engineer. In the course of my experience I have seen a winch operated in taking up a slack line.

Q. And basing your answer on your experience, was or was not this more than was necessary to take up the slack in the line?

Mr. HUTTON.—I object to that on the ground that he is not the man that run the winch.

The COURT.—Being an engineer, he would have some knowledge of the operation of the winch, but how much weight should be given to it is another matter. He may answer, the objection is overruled.

A. I would say very much more. [47]

Cross-examination.

I knew Mr. Petterson had been hit on the arm before he returned from the hospital getting his arm bandaged up. I knew it from common talk around the ship. I first knew it very shortly after he was hurt. Winches always make considerable clattering when they are used. They are not run very violently if a winch-driver is driving them; frequently they

(Testimony of Thomas Selfridge.)

run very violently, but frequently they have very poor winch-drivers. The mast always shakes when you are hoisting cargo; when you are hoisting cargo there is always a lot of shaking and noise and clattering going on on deck. The only way Mr. Petterson could lower the booms would be with the falls.

TESTIMONY OF S. SORENSON, FOR DEFENDANT (RECALLED).

S. SORENSON, a witness for defendant, having been previously sworn and being recalled, testified as follows:

Direct Examination.

At the time this block fell and struck Mr. Petterson, I was standing one foot behind him. At the time he operated the winch I was about a foot and a half distant from him, about as close as I could possibly get and not be in his way.

Cross-examination.

Mr. Petterson was standing with the levers of the winch in his hand when he got hit. The boom was right over his head, and that is where the block came down and hit him on the arm, and I was there taking in the slack in the guy line.

Defendant thereupon rested.

TESTIMONY OF S. PETTERSON, IN HIS OWN BEHALF (RECALLED).

S. PETTERSON, plaintiff, having been previously sworn and being recalled, testified as follows:

Direct Examination.

I paid the Morton Hospital a bill of $69.00; I paid $5.00 for rebandaging that Dr. Poheim ordered me to get; I paid out $74.00 all together. I never told the chief engineer that [48] I was running a winch when I got hit. I talked with the chief engineer after I had been up at the hospital. I told him that the block came down and hit me on my arm and broke the bone and that I had to leave the ship and got to the hospital and the chief engineer told me he felt sorry that anything like that happened.

Cross-examination.

It is not true that as the booms are lowered the donkey-falls become slack. As you lower the booms it stands there the same as if you are making the line fast here, and make it fast over there; that has no effect on these booms at all.

Q. What position was your arm in at the time you were struck? A. I had my arm on the winch.

Q. You had your hand on the lever of the winch?

A. No, on the winch.

Q. You mean on the lever of the winch, don't you?

A. I don't know if it was on the lever of the winch or if it was on top of the big cog wheels.

Q. It might have been on the lever of the winch?

(Testimony of S. Petterson.)

A. It might have been on the lever of the winch and it might have been there.

Q. That is why your arm was out in a horizontal position?

A. My arm was in a horizontal position like that when it was struck.

Q. Whether or not you had hold of the levers, you don't know?

A. No, I don't think I did have hold of the levers.

Redirect Examination.

The donkey-fall leads from the barrel of the winch into what we call the gin block at the foot of the mast, a little above the deck; that is, it goes around the winch, then it follows the [49] boom up to the end; there is another block there; then it goes right down to the boom. One end of the boom comes down to the mast; it has a band around it with an eyebolt. The rope that lowers and raises the boom is above the boom; it comes to a cleat and is made fast on a cleat. There are two ropes from the winch, one that runs up along the boom to go over the end and handle the cargo and another one that goes above to move the boom up and down. When you are through hoisting cargo the cargo hook goes up in the air and stays there; the boom stays there too, but when you are through loading and are going to leave port we always lower them down. After the booms are lowered the cargo hook lays there on the deck or on the deckload; if there is a load of lumber it lays on the lumber.

(Testimony of S. Petterson.)

Recross-examination.

The two booms are about 40 feet apart; when you swing them together and bring them down there would be a slack in the ropes, but that slack is already taken in before the booms are lowered. The band and eyebolt and block were on the mainmast about 100 feet above the deck. I never took any particular measurement of it, but should judge that it was about that; the block was about 20 feet above the falls that held the booms up.

The plaintiff thereupon rested.

TESTIMONY OF E. B. BUTZING, FOR DEFENDANT (RECALLED).

E. B. BUTZING, a witness for defendant, having been previously sworn and being recalled, testified as follows:

Direct Examination.

The block was about 65 or 70 feet from the place where Mr. Petterson was standing; he was standing on the top of the house and the mast comes down to the bottom of the ship; he was about 20 feet above the deck and this block was about 65 feet or 70 feet above him; the block is near the top of the mast; there [50] is a foot or two of the mast still higher than the block.

Cross-examination.

I don't know whether the block was originally there for wireless; the block was within a foot or two of the top of the mast. I don't know what the block was there for originally.

The foregoing is all of the evidence introduced by both sides in this case. Thereupon the following took place:

Mr. DALL.—Now, if your Honor please, in order to preserve our rights, I understand it is necessary for us to make a motion at this time that judgment be entered for the defendant on the ground that the evidence is insufficient in law to warrant a finding for the plaintiff, and on the ground particularly that it shows that the action was caused by the negligence of the plaintiff, himself. I understand such a motion is necessary in order to preserve our rights for review.

The COURT.—The motion will be taken into consideration and the whole matter determined at one and the same time.

EXCEPTION No. 3.

The foregoing constitutes all of the proceedings and all of the testimony offered and received on the trial of said action, and now within the time required by law, and the rules of this court, said defendant proposes the foregoing as and for its bill of exceptions to the ruling of the Court made during the trial of the above-entitled action and to the decision of said court, and prays that the foregoing may be signed, settled, allowed and approved as correct.

Dated: San Francisco, California, May 29th, 1924.

JONES & DALL,
C. W. DALL,
Attorneys for Defendant. [51]

It is hereby stipulated that the above and foregoing constitutes a true and correct bill of exceptions in the above-entitled action, and that the same contains all of the proceedings had and all of the testimony offered and received on the trial of said action and all of the rulings of the Court made during the trial of said action, and that the same may be signed, settled, allowed and approved as and for the bill of exceptions to such rulings and to the decision of said court herein.

Dated: San Francisco, California, June 4th, 1924.

H. W. HUTTON,
Attorney for Plaintiff.
JONES & DALL,
C. W. DALL,
Attorneys for Defendant.

CERTIFICATE OF JUDGE TO BILL OF EXCEPTIONS.

I, George M. Bourquin, Unied States District Judge, being the Judge before whom the above-entitled action was tried, do hereby certify the foregoing is a true and correct bill of exceptions, and contains all of the proceedings had and all of the testimony offered and received on the trial of said action, and all rulings of the Court made during said trial; that the same has been presented in due time and is hereby signed, settled, allowed and approved as and for the engrossed bill of exceptions to the rulings of the Court made during the trial of said action and to the decision of said Court.

Dated: San Francisco, California, June 16, 1924.

GEORGE M. BOURQUIN,
United States District Judge.

[Endorsed]: Filed June 19, 1924. Walter B. Maling, Clerk. [52]

In the Southern Division of the District Court of the United States, in and for the Northern District of California, Second Division.

AT LAW—No. 16,947.

S. PETTERSON,

Plaintiff,

vs.

HOBBS WALL & COMPANY, a Corporation,

Defendant.

PETITION FOR WRIT OF ERROR.

Now comes Hobbs Wall & Company, a corporation, defendant in the above-entitled cause, and feeling itself aggrieved by the judgment of the above-entitled court entered therein on the first day of April, 1924, in favor of S. Petterson, plaintiff, and against said defendant, Hobbs Wall & Company, hereby petitions this Court for an order allowing it to prosecute a writ of error to the United States Circuit Court of Appeals for the Ninth Circuit, for the reasons set forth in the assignment of errors filed herewith, under the laws of the United States in such cases made and provided.

WHEREFORE said defendant, Hobbs Wall & Company, prays that a writ of error be issued in this behalf to said Circuit Court of Appeals for the correction of the errors complained of and herewith assigned, and that citation issue as provided by law, and that an order be made fixing the amount of security to be given by plaintiff in error conditioned as the law directs, and that a transcript of the record and proceedings in this case duly authenticated may be sent to said Circuit Court of Appeals under the rules in such cases made and provided and, upon giving [53] such bond, that all other proceedings may be suspended until the determination of said writ of error by said Circuit Court of Appeals.

JONES & DALL,
C. W. DALL,
Attorneys for Defendant.

[Endorsed]: Filed June 19, 1924. Walter B. Maling, Clerk. [54]

In the Southern Division of the District Court of the United States in and for the Northern District of California, Second Division.

AT LAW.—No. 16,947.

S. PETTERSON,

Plaintiff,

vs.

HOBBS WALL & COMPANY,

Defendant.

ASSIGNMENT OF ERRORS.

Now comes Hobbs Wall & Company, a corporation, defendant in the above-entitled cause, and in connection with its petition for a writ of error makes the following assignment of errors:

I.

The Court erred in admitting over the objection of defendant the testimony of R. E. Haggard, witness on behalf of the plaintiff, as to the nature of plaintiff's injury according to the test used by the Industrial Accident Commission of the State of California in cases coming within its jurisdiction, the full substance of such admitted evidence and the proceedings which were had thereon being as follows:

R. E. Haggard, called as a witness on behalf of the plaintiff, was duly sworn and testified as follows:

Direct Examination.

I hold with the Industrial Accident Commission the position of superintendent of permanent disability, rate department, and have been such since February, 1919. As such I am called upon to examine people who have received injuries. We have a gripping machine, called a dynamometer, for testing the [55] strength of arms and hands. The Industrial Accident Commission has a regular schedule, with supplemental rules and notes, used for fixing the percentage of permanent partial disability.

Mr. HUTTON.—Q. This man Petterson, the plaintiff in this case, has he ever been to your place to be examined, to have his arm examined by you?

Mr. DALL.—If your Honor please, we interpose the objection on the ground it is immaterial, irrelevant and incompetent. The workmen's compensation law of the State of California does not apply to this injury.

Mr. HUTTON.—I am only trying, if your Honor please, to show just the character of this man's injury from what this witness observed, in addition to what the doctor testified.

The COURT.—I will hear it. If not competent or material the Court will give it no consideration in making up its decision. The objection will be overruled for the sake of the record and an exception noted.

Mr. HUTTON.—Q. He has been to you, has he not? A. I saw him yesterday morning.

Q. You saw him before that, too, did you?

A. I have no definite recollection.

Q. What test did you put his arm and hand under yesterday, or did you put it under any test?

Mr. DALL.—One moment, may my objection be considered as going to all of this line of examination?

The COURT.—Yes, all of this character of testimony, with an exception noted.

A. I tested him out on the gripping machine, to find out what the grasp in the injured hand was in relation to the grasp and power in the uninjured hand. [56]

Mr. HUTTON.—Q. Did you find any difference in the two hands?

A. I found that on the injured hand the grasping power tested 50 pounds, in the uninjured hand 140 pounds.

Q. Did you observe the alignment of his arm?

A. I did not, no.

Q. Did you make any physical examination other than that of his hand and arm?

A. The only examination I made was with regard to the grasping power.

Q. Is that the only examination you made with the gripping machine? A. Yes.

Q. Did you make a full and careful examination of it? A. Of the arm?

Q. Yes. Did you do anything further than the test with the gripping machine? A. No.

II.

The Court erred in that it did not grant defendant's motion made at the conclusion of the trial that judgment be entered for the defendant on the ground that the evidence was insufficent in law to warrant a finding for the plaintiff, and on the ground particularly that it shows that the accident was caused by the negligence of the plaintiff himself, for the reason that plaintiff's complaint alleged that defendant was negligent in not having a nosing around the hook of the block which fell and struck plaintiff, and the burden was on plaintiff to prove such negligence, but plaintiff did not sustain such burden and did not offer any evidence to prove such negligence except the bare fact that

said block fell and struck him, whereas, on the [57] other hand, the evidence which defendant introduced showed that the hook of said block did have a nosing around it, and further that said block was caused to fall and plaintiff was injured solely as a result of plaintiff's own negligence in operating the winch too roughly and in shaking too strongly the mast to which said block was attached by a band, thereby causing the hook of said block to slip out of the eye on said band and said block to fall and injure said plaintiff.

III.

The Court erred in rendering judgment in favor of plaintiff and against defendant for the same reasons specified in paragraph II herein, that it erred in not granting defendant's motion for judgment.

WHEREFORE defendant prays that the judgment of said District Court of the United States be reversed.

JONES & DALL,
C. W. DALL,
Attorneys for Defendant.

[Endorsed]: Filed June 19, 1924. Walter B. Maling, Clerk. [58]

In the Southern Division of the District Court of the United States in and for the Northern District of California, Second Division.

AT LAW —No. 16,947.

S. PETTERSON,

Plaintiff,

vs.

HOBBS WALL & COMPANY, a Corporation,

Defendant.

ORDER ALLOWING WRIT OF ERROR.

Hobbs Wall & Company, a corporation, defendant herein, having filed herein its petition for the allowance of a writ of error, accompanied by an assignment of errors,—

NOW, THEREFORE, IT IS ORDERED: That said petition be, and the same is hereby, allowed and said writ of error granted, and that a certified transcript of the record and proceedings in this cause be forthwith transmitted to the United States Circuit Court of Appeals for the Ninth Circuit; and

IT IS FURTHER ORDERED, that said defendant give a supersedeas bond according to law, in the sum of two thousand eight hundred fifty dollars ($2,850.00), conditioned that the plaintiff in error shall prosecute its writ of error to effect, and answer all damages and costs if it fail to make its plea good; that upon such bond being given all further proceedings may be stayed until the de-

termination of said writ of error by said Circuit Court of Appeals.

Dated June 19, 1924.

JOHN S. PARTRIDGE,
United States District Judge.

[Endorsed]: Filed June 19, 1924. Walter B. Maling, Clerk. [59]

(BOND ON APPEAL.)

Premium on This Bond is $28.50 a Year.

KNOW ALL MEN BY THESE PRESENTS, That we, Hobbs Wall & Company, a corporation, as principal, and Maryland Casualty Company, a corporation, as sureties, are held and firmly bound unto S. Petterson in the full and just sum of two thousand eight hundred fifty dollars, and damages for delay, and costs and interest on appeal to be paid to the said S. Petterson, his certain attorney, executors, administrators or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 19th day of June, in the year of our Lord one thousand nine hundred and twenty-four.

WHEREAS, lately at a district Court of the United States for the Northern District of California Southern Division, in a suit depending in said court between S. Petterson, plaintiff, and Hobbs Wall & Company, a corporation, defendant, a judgment was rendered against the said defendant

and the said defendant having obtained from said Court a writ of error to reverse the judgment in the aforesaid suit, and a citation directed to the said plaintiff citing and admonishing him to be and appear at a United States Court of Appeals for the Ninth Circuit, to be holden at San Francisco, in the State of California within thirty days from the date of said citation.

NOW, THE CONDITION OF THE ABOVE OBLIGATION IS SUCH, That if the said defendant Hobbs Wall & Company shall prosecute its writ of error to effect, and answer all damages and costs if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue. [60]

HOBBS WALL & COMPANY. (Seal)
By W. J. HOTCHKISS,
President.
By D. ELMER DYER,
Attorney-in-fact. (Seal)

Acknowledged before me the day and year first above written.

Maryland Casualty Company, a corporation, the surety herein, expressly agrees that in case of a breach of any condition of the within bond, the said Court may, upon notice to it of not less than ten days, proceed summarily in said action in which said bond is given to ascertain the amount which such surety is bound to pay on account of such

breach, and render judgment therefor against it and award execution therefor.

MARYLAND CASUALTY COMPANY,
By D. ELMER DYER, (Seal)
Attorney-in-fact.

Form of bond and sufficiency of sureties approved.

June 20th, 1924.

JOHN S. PARTRIDGE,
Judge.

[Endorsed]: Filed June 20, 1924. Walter B. Maling, Clerk. [61]

In the Southern Division of the United States District Court for the Northern District of California.

Clerk's Office.

No. 16,947.

S. PETTERSON

vs.

HOBBS WALL & COMPANY, a Corporation.

PRAECIPE FOR TRANSCRIPT OF RECORD.

To the Clerk of Said Court:

Sir: Please prepare a transcript of record and transmit such record to the United States Circuit Court of Appeals for the Ninth Circuit pursuant to a writ of error herein, including in such transcript of record the following:

1. Complaint;
2. Writ of certiorari for removal of cause from State Court;
3. Answer;
4. Stipulation waiving jury;
5. Judgment;
6. Opinion of court;
7. Stipulations extending time to file bill of exceptions;
8. Bill of exceptions;
9. Petition for writ of error;
10. Assignment of errors;
11. Order granting writ of error;
12. Bond on appeal;
13. Praecipe for transcript of record.

Dated: June 20th, 1924.

JONES & DALL,
C. W. DALL,
Attorneys for Defendant.

[Endorsed]: Filed June 20, 1924. Walter B. Maling, Clerk. [62]

CERTIFICATE OF CLERK U. S. DISTRICT COURT TO TRANSCRIPT OF RECORD.

I, Walter B. Maling, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify that the foregoing sixty-two pages, numbered from 1 to 62, inclusive, to be a full, true and correct copy of the record and proceedings as enumerated in the praecipe for record

on writ of error, as the same remain on file and of record in the above-entitled cause, in the office of the clerk of said Court, and that the same constitute the return to the annexed writs of error.

I further certify that the cost of the foregoing return to writ of error is $24.10; that said amount was paid by the defendant, and that the original writ of error and citation issued in said cause are hereto annexed.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court this 18th day of July, A. D. 1924.

[Seal] WALTER B. MALING,
Clerk of the United States District Court, Northern District of California.

By J. A. Schaertzer,
Deputy Clerk. [63]

(WRIT OF ERROR.)

UNITED STATES OF AMERICA,—ss.

The President of the United States of America, To the Honorable, the Judges of the District Court of the United States for the Northern District of California, Southern Division, GREETING:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court, before you, or some of you, between Hobbs Wall & Company, a Corporation, plaintiff in error, and S. Petterson, defendant in error, a manifest error hath happened, to the

great damage of the said Hobbs Wall & Company, plaintiff in error, as by its complaint appears:

We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at the City of San Francisco, in the State of California, within thirty days from the date hereof, in the said Circuit Court of Appeals, to be then and there held, that, the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

WITNESS, the Honorable WILLIAM H. TAFT, Chief Justice of the United States, the 20th day of June, in the year of our Lord one thousand nine hundred and twenty-four.

[Seal] WALTER B. MALING,
Clerk of the United States District Court.
By C. M. Taylor,
Deputy Clerk.

Allowed by:

JOHN S. PARTRIDGE,
United States District Judge.

Receipt of a copy of the within writ of error is hereby admitted this 20th day of June, 1924.

H. W. HUTTON,
Attorney for Plaintiff.

[Endorsed]: No. 16,947. United States District Court for the Northern District of California, Southern Division. Hobbs Wall & Company, a Corporation, Plaintiff in Error, vs. S. Petterson, Defendant in Error. Writ of Error. Filed Jul. 9, 1924. Walter B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [64]

(RETURN TO WRIT OF ERROR.)

The answer of the Judge of the District Court of the United States, in and for the Northern District of California, Second Division.

The record and all proceedings of the plaint whereof mention is within made, with all things touching the same, we certify under the seal of our said court, to the United States Circuit Court of Appeals for the Ninth Circuit, within mentioned, at the day and place within contained, in a certain schedule to this writ annexed as within we are commanded.

By the Court:

[Seal] WALTER B. MALING,
Clerk U. S. District Court.
By J. A. Schaertzer,
Deputy Clerk. [65]

(CITATION ON WRIT OF ERROR.)

UNITED STATES OF AMERICA,—ss.

The President of the United States, To S. Petterson, GREETING:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the city of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to a writ of error duly issued and now on file in the Clerk's Office of the United States District Court for the Northern District of California, Southern Division, wherein Hobbs Wall & Company, a corporation, is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable JOHN S. PARTRIDGE, United States District Judge for the Northern District of California, this 20th day of June, A. D. 1924.

JOHN S. PARTRIDGE,
United States District Judge.

Receipt of a copy of the within citation is hereby admitted this 20th day of June, 1924.

H. W. HUTTON,
Attorney for Plaintiff.

[Endorsed]: No. 16,947. United States District Court for the Northern District of California, Southern Division. Hobbs Wall & Company, a Corporation, Plaintiff in Error, vs. S. Petterson, Defendant in Error. Citation on Writ of Error. Filed Jul. 9, 1924. Walter B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [66]

[Endorsed]: No. 4286. United States Circuit Court of Appeals for the Ninth Circuit. Hobbs Wall & Company, a Corporation, Plaintiff in Error, vs. S. Petterson, Defendant in Error. Transcript of Record. Upon Writ of Error to the Southern Division of the United States District Court of the Northern District of California, Second Division.

Filed July 18, 1924.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

No. 4286

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

HOBBS WALL & COMPANY,
(a corporation),
Plaintiff in Error,

vs.

S. PETTERSON,
Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

JONES & DALL,
Attorneys for Plaintiff in Error.

ESMOND SCHAPIRO,
Of Counsel.

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No. 4286

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HOBBS WALL & COMPANY,
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S. PETTERSON,
Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

I.

STATEMENT OF FACTS.

Plaintiff (defendant in error herein) brought this action for an injury to his right arm, received from the fall of a block on the Steamer "Crescent City", owned and operated by defendant (plaintiff in error herein), on which plaintiff was serving as second mate.

The complaint alleged unseaworthiness of the vessel and consequent negligence of the defendant, and counts solely on the alleged fact that the block which was hooked into an eye attached to an iron band around the main mast about a foot or two

from the top, did not have a nosing or seizing across the mouth of the hook so as to prevent the block from unhooking from the eye.

The answer presented a general denial to this specification of unseaworthiness and negligence, and also an additional defense to the effect that the block was jarred out of said eye and caused to hit plaintiff, solely by his own negligence due to the fact that in trying to untangle the donkey fall from the midship guy he operated the winch on said vessel too violently and caused the main mast to shake to such an extent that the block was thereby jarred out of the eye and caused to fall.

The case was tried by the court without a jury, a jury having been duly waived by written stipulation filed with the clerk (Tr. p. 12).

At the conclusion of the trial defendant made a motion for a judgment in its favor on the ground that the evidence was insufficient to justify a judgment for the plaintiff, and further that the evidence showed that the accident was caused by the negligence of the plaintiff himself. The court did not rule on the motion at that time, but reserved it for determination along with the whole case. This action of the court and its failure to grant the motion, was excepted to by defendant as appears in the bill of exceptions (Tr. p. 59). Subsequently the court awarded plaintiff a judgment for $2850.00, from which judgment defendant prosecutes this writ of error.

It was admitted that on a block in use on board ship it is customary and proper to have a nosing of rope yarn, marlin or wire tied across the mouth of the hook, in order to prevent the hook from jarring out of the eye.

At the trial plaintiff stated that the hook on the block which hit him did not have a nosing across it when the block fell (Tr. p. 36), but on cross-examination admitted that he actually had not looked to see whether or not it had such nosing, either at the time it fell (Tr. p. 41) or at any time prior thereto (Tr. p. 40). No other witness testified on behalf of plaintiff as to this matter.

Plaintiff admitted that it could be determined by an inspection of the block whether there had been a nosing, because there would be a mark where the nosing was tied around the hook, particularly since the block had been painted a few months prior to the accident and the space covered by the nosing naturally would reveal an unpainted surface (Tr. pp. 36, 49-50).

The particular block which fell and hit plaintiff was introduced in evidence (Tr. p. 51). Upon examining this block plaintiff admitted that it bore marks where the nosing went around the hook (Tr. p. 42). Captain Butzig, the master of the "Crescent City", testified to the same effect (Tr. pp. 49-50). Plaintiff introduced no contradictory evidence.

It was shown that, at the time of the accident, there was on board the "Crescent City" the proper

material with which to place a nosing around the hook of this block if necessary, and that if plaintiff had seen such a nosing was missing it was within his province as second mate to have the same replaced. No one at any time had reported that the hook had no nosing around it (Tr. p. 49).

Although the complaint alleged that the block in question was an unused one, defendant proved that it had been used both for a signal halyard and in painting the main mast just a few months before the accident happened (Tr. pp. 35, 40-41, 50).

At the time of the accident the "Crescent City" was at North Bend, Oregon, taking on a cargo of lumber for San Pedro. The loading of the lumber had been completed and the vessel was being made ready for sea, under the direction of plaintiff as second mate; the captain and first mate were ashore. The cargo booms on the foremast had already been lowered to the deck by plaintiff and some of the crew, and they were proceeding to lower the booms on the main mast. S. Sorenson, a seaman on the "Crescent City", who witnessed the accident, testified on behalf of defendant that in lowering these booms the cargo hook had become entangled in the midship guy and that plaintiff took the levers of the winch and jerked the hook from one side to the other, until it became disentangled and that in so operating the winch plaintiff caused the mast to shake (Tr. p. 47); that, at the time the block fell and hit him, plaintiff was standing with the levers of the winch in his hand (Tr. p. 55); that a man

could have climbed up and unhooked the entanglement (Tr. p. 47); that one Delquist, another member of the crew, was in the rigging at the time, ready to do so (Tr. p. 48). Thomas Selfridge, chief engineer on the "Crescent City", also called by defendant, testified that he was in his room, thirty feet away at the time the accident happened, and that he could feel the vibration caused by the operation of the winch, and that it was being operated very violently, and that the mast was being jerked very considerably, and that he could hear the plaintiff swearing; that the vibration was very much more than would be caused by merely taking up the slack on the line (Tr. pp. 53-54).

Plaintiff admitted he operated the winch to draw the line up and get the cargo hook up in the air and out of the way (Tr. p. 43); also that when the block hit him his arm was on the winch, but did not remember whether it was on the lever or on top of the cog wheels (Tr. p. 56). He denied that he had used the winch in an effort to jerk the line loose (Tr. p. 43), but did not remember whether or not when he hoisted the cargo hook it became entangled with the midship guy (Tr. p. 43). He admitted some sailor wanted to go aloft and he told him, "No, it is not necessary, because the hook is not used" (Tr. p. 44). No other witness testified on behalf of plaintiff as to how the accident happened.

It was admitted that the block was not used in raising and lowering the booms and had no connection at all with such operation. The evidence also

showed that when the winch is used in loading and unloading the vessel the mast is caused to shake more or less, and that such shaking of the mast might possibly break the nosing and cause the block to fall. It was also testified that, if plaintiff operated the winch violently, thereby causing the mast to shake, the nosing might break and the block unhook and fall (Tr. p. 50); that it would take considerable shaking to jar the hook of the block out of the eye, even if the nosing had broken off (Tr. p. 50).

II.

SPECIFICATION OF ERRORS RELIED UPON.

The error which defendant specifies and relies on for a reversal of the judgment is the refusal of the court to grant defendant's motion made at the conclusion of the trial that judgment be entered in its favor, on the ground that the evidence was insufficient in law to warrant a finding for the plaintiff, and further that the evidence shows that the accident was caused by the negligence of the plaintiff himself. This motion should have been granted because the burden was on plaintiff to prove that the vessel was unseaworthy or defendant negligent, in that there was no nosing around the hook of the block which fell and struck plaintiff, but plaintiff did not offer any evidence to prove such unseaworthiness or negligence except the bare fact that the block fell, and plaintiff failed to sustain such

burden of proof which was upon him. On the other hand, defendant's evidence showed that said hook did have a nosing around it and further that the block was caused to fall and plaintiff was injured solely as a result of his own negligence in operating the winch too violently, thereby shaking the mast to which said block was attached by a band and causing the hook to slip out of the eye on said band, with the result that the block fell and injured him (Assignments of Error No. II and III, Tr. pp. 65-66).

III.

OUTLINE OF ARGUMENT.

A.

The question whether the evidence is sufficient in law to justify a judgment for plaintiff is properly before this court for review.

B.

The burden of proving that there was no nosing around the hook was on the plaintiff, but he introduced no evidence other than the fact that the block fell and hit him. Defendant, however, introduced evidence to show there was a nosing around the hook and furthermore that the accident was caused by the plaintiff's own negligence. Plaintiff utterly failed to sustain the burden of proof, and the court should have granted defendant's motion for judgment.

C.

A review of cases involving injuries to seamen with facts similar or comparable to the facts of this case compels the conclusion that plaintiff failed to prove a cause of action herein and judgment should have been awarded to defendant.

D.

It is a general rule of law that negligence cannot be surmised or conjectured or left to speculation from the happening of an accident, and that in the absence of facts establishing negligence the court must award defendant judgment. This rule is directly applicable to this case.

E.

Plaintiff cannot claim herein the benefit of the doctrine of *res ipsa loquitur* because it is ordinarily not applicable in actions by seamen for injuries received on account of the unseaworthiness of the vessel or the negligence of the owners, or in cases of master and servant generally, and even if the doctrine could apply it would not apply in this case as defendant introduced evidence explaining the cause of the accident which evidence was not overcome by plaintiff.

IV.

ARGUMENT.

A.

The Question Whether the Evidence is Sufficient in Law to Justify a Judgment for Plaintiff is Properly Before this Court for Review.

As heretofore stated, the defendant, at the conclusion of the trial, moved that judgment be entered in its favor on the ground that the evidence was insufficient in law to warrant a finding for the plaintiff, and that the evidence showed that the accident was caused by plaintiff's own negligence. The court then stated that he would take the motion under consideration and determine the whole matter at one time, to which defendant excepted. The court's refusal to grant the motion also was duly assigned as error in the assignment of errors filed by defendant. By such motion, exception and assignment of error, defendant has preserved for review by this court the question whether the evidence is sufficient to show unseaworthiness of the vessel or negligence on the part of the defendant for which it is liable. *Town of Martinton v. Fairbanks,* 112 U. S. 670, 28 L. Ed. 862; *Societe Nouvelle D'Armement v. Barnaby,* 246 Fed. 68; *Stoffregen v. Moore,* 271 Fed. 680. If it is shown that there was no evidence to justify a judgment against defendant, the court erred in denying defendant's motion for judgment, and the judgment in favor of plaintiff must be reversed by this court.

B.

The Burden of Proving That There Was No Nosing Around the Hook Was on the Plaintiff, But He Introduced No Evidence Other Than the Fact That the Block Fell and Hit Him. Defendant, However, Introduced Evidence to Show There Was a Nosing Around the Hook and Furthermore That the Accident Was Caused by Plaintiff's Own Negligence. Plaintiff Utterly Failed to Sustain the Burden of Proof, and the Court Should Have Granted Defendant's Motion for Judgment.

The following cases establish conclusively that in this action by a seaman to recover indemnity for injuries due to the alleged unseaworthiness of the vessel or negligence of her owners, the burden is on plaintiff to prove that the vessel was unseaworthy or defendant negligent in the particular alleged, and unless he sustains such burden the court must award defendant judgment or direct a verdict in its favor if the case was tried by a jury: *"The Lydia M. Deering"*, 97 Fed. 971; *"The Edwin"*, 87 Fed. 54; *Bank v. Herbert May Co.*, 298 Fed. 283; *McDonnell v. Oceanic Steam Navigation Co.*, 143 Fed. 480; *"The Columbia"*, 106 Fed. 745; *Johnson v. Fredrick Leyland & Co.*, 153 Fed. 572.

The same is true in actions between master and servant generally, arising out of injuries received by the servant in his employment: *Patton v. Texas & Pacific Railway Co.*, 179 U. S. 658, 45 L. Ed. 361; *James Stewart & Co. v. Newby*, 266 Fed. 287; and in actions brought under the Federal Employer's Liability Act: *New Orleans & N. E. R. Co. v. Harris*, 247 U. S. 367, 62 L. Ed. 1167.

It is submitted that plaintiff entirely failed to sustain such burden in this case. The cause of action was based, as hereinbefore stated, solely on the absence of a nosing, and it was upon plaintiff to prove such absence and that it was the cause of his injury, but the only evidence which plaintiff introduced was that of plaintiff himself, establishing solely the fact that the block fell and hit him. Other than the falling of the block he introduced no evidence whatsoever to show the lack of nosing. The original block which had hit plaintiff was put in evidence and defendant proved in fact that there had been a nosing around its hook. The presence of the nosing at the time the block was painted a few months before it fell was clearly apparent from the absence of paint on the parts of the hook which the nosing had covered. Plaintiff admitted, upon inspecting the hook and block, that there had been a nosing around it and did not attempt to contradict this showing in any manner. Defendant then introduced evidence which tended to show that the real cause of the accident was the fact that plaintiff, in endeavoring to untangle the cargo hook from the midship guy while the cargo booms were being lowered preparatory to sailing, operated the winch so violently that it caused the mast to shake so much that the block, which was thereby jarred out of the eye, fell and hit him. This evidence was corroborated by the chief engineer of the "Crescent City" who, although not an eye-witness to the accident, was in his room only thirty (30) feet away and

testified that he could not help but notice the violent operation of the winch and the consequent shaking of the mast.

The plaintiff denied such negligence but was not corroborated by any other witness. This denial should not be given any weight because plaintiff was in fact hazy as to the circumstances surrounding the occurrence of the accident; for example, he could not remember whether the cargo hook had become entangled with the midship guy, and yet had a dim recollection that some sailor by the name of Delquist offered to go aloft in the rigging and untangle the same (Tr. p. 44); again, although he denied that he was operating the winch at the time the block fell (Tr. p. 43), he finally admitted that his arm was on the winch at the time the block hit him (Tr. p. 56).

It would seem clear that there was no evidence whatever to prove the absence of a nosing across the mouth of the hook in question, and that there was affirmative evidence to show the presence of such a nosing; and further, that the cause of the accident was the plaintiff's own negligence in operating the winch too violently in trying to untangle the cargo hook from the midship guy. Under such circumstances the authorities which will be discussed under "(c)" and "(d)", involving similar situations and comparable facts, seem to establish conclusively that the court should have granted defendant's motion for judgment and that the judgment in favor of plaintiff should be reversed by this court on appeal.

C.

A Review of Cases Involving Injuries to Seamen With Facts Similar or Comparable to the Facts of this Case Compels the Conclusion That Plaintiff Failed to Prove a Cause of Action Herein and Judgment Should Have Been Awarded to Defendant.

"The France", 59 Fed. 479. In this case the handle of an ashbag being hoisted full from the hold, broke, causing the bag to fall 25 feet and strike and injure libelant. The bag was a new one in which no defect had been noticed and had been filled and emptied several times, and the break occurred because of a violent jerk occasioned by the slipping of the chain from the drum of the winch, the cause of which jerk was not shown. The Circuit Court of Appeals reversed the decree in favor of libelant on the ground that there was no showing of negligence on the part of the steamship, and that the court was left wholly to conjecture as to the cause of the accident.

In *Mercurio v. Lunn,* 93 Fed. 592, libelant was injured by the fall of the derrick boom. It was claimed that the accident happened partly because the boom was not fastened safely to the mast. The evidence showed that the boom could not possibly have fallen except for some very extraordinary cause. The decree for libelant was therefore reversed by the Circuit Court of Appeals with instructions to dismiss the libel.

In *Crockett v. Brandt,* 271 Fed. 415, a seaman, while mending a sail with needle and yarn, had his eye pierced by the needle, and alleged that the sail

was so rotten that the needle pierced through it. Judgment for plaintiff in an action at law was reversed by the Circuit Court of Appeals on the ground that there was no evidence to show any negligence on the part of the defendant or unseaworthiness of the vessel, and that the cause of the accident appeared to be the result of plaintiff's own manner of doing his work.

Adams v. Bortz, 279 Fed. 521. This was an action at law by the steward of the steamship "Malden", who had been injured by falling from a temporary stairway, caused by a sudden lurch of the vessel, and was awarded judgment by the lower court. The Circuit Court of Appeals, after reviewing the evidence, held that by a "seaworthy ship" is meant one having equipment and appliances reasonably safe for its purpose, and that since the evidence showed no unseaworthiness under this test, judgment against defendant must be reversed.

It will be noted that the above are cases where the Circuit Court of Appeals has reversed judgments of the lower court in favor of the plaintiff on the ground that the evidence was insufficient to justify a finding of unseaworthiness or negligence against the defendant. The following cases, some in the District Court and some in the Circuit Court of Appeals, in all of which judgment was awarded to defendant in the first instance, are also in point.

"The Henry B. Fiske", 141 Fed. 188 (Dist. Ct. Mass.). In this case a schooner was anchored during a severe gale when a patent spring rider which

held one of the two anchor chains in use, broke, and libelant, who was cleaning the locker, was struck and injured by a chain which had run out from the locker. The rider was made of cast iron, the material ordinarily used, and showed no defect. The appliance was not old, had been made by a reliable manufacturer and had been used under substantially the same strain for several hours and on previous occasions, without breaking. Held that there was no evidence of negligence for which the vessel was liable.

"The Baron Innerdale", 93 Fed. 492 (Dist. Ct. of New York), in which the court in dismissing a libel brought by a stevedore who had been injured by an iron boom which had been released by the breaking of an iron hook which libelant alleged to be of inferior quality and defective, said (p. 493):

> "The burden of proving that the shipowner did not use ordinary care in the selection and maintenance of the hooks is upon the libelant. The evidence produced to fulfill that burden must be sufficiently clear, distinct, and preponderating to convince the court, without resort to conjectures or surmises, that the claimant was negligent. When, after a careful study and consideration of the case, a judge cannot state candidly that his reason is convinced by the weight of evidence that the respondent, in some particular pointed out, has negligently done, or omitted to do, some act, in breach of his duty, the libelant has not fulfilled the burden resting upon him. Courts are required to examine, compare, analyze, infer, weigh, and strike the balance of probabilities; but they are not required to hazard opinions that a person has done wrong, without the

> presentation of intelligible and substantiated facts which tend to establish the accusation. A question of fact may be refined to such a degree that an accurate solution is beyond any reliable intellectual process. At such point of mystification, the court is justified in holding that the libelant has not sustained the burden of proof; that the domain of reasoning has been passed, and that of pure surmise entered."

"The Lydia M. Deering", 97 Fed. 971 (Dist. Ct. Penn.). Libelant was injured by a blow from a rope, to which power was being applied by the vessel's donkey engine in bringing her further into a wharf. Libelant claimed that the accident was due to the fact that a certain block lacked a safety appliance to prevent the rope from slipping, but there was also evidence to show that the hawser first slipped and thus caused the rope to escape from the block. Held that the burden was on libelant to prove his averment, and that having failed to satisfy the court that the same was true, and it appearing that the injury was an accident, the libel must be dismissed.

In *"The Edwin"*, 87 Fed. 540 (Dist. Ct. New York) a longshoreman was struck and injured by the falling of a boom from its crotch, and claimed that the crotch was badly worn and caused the injury. Defendant introduced evidence to show that the crotch was in good condition. The court held that in view of the fact that the burden was on libelant and he had not sustained the same by evidence establishing negligence, and that from

the character of the evidence the injury must have been an accident, the libel must be dismissed.

Burton v. Greig, 265 Fed. 418, affirmed 271 Fed. 271 (Circuit Court, 5th Cir.). In this case a steamship fireman was killed by the blowing out of a copper steam pipe, which had been in use several years, and had given satisfactory and safe service. No latent defect or condition was shown. Held, that the vessel was not liable.

"The Petroline", 271 Fed. 273 (Cir. Ct. 2nd Cir.). Evidence held insufficient to show that injury to seaman by falling of hatch cover on his hand was due to unseaworthiness of the ship in that the stick or block furnished for use to hold up the cover when raised for ventilation, was worn or defective. Stress was laid on the fact that the evidence showed that the plaintiff himself had been manipulating the cover.

See also *Hanrahan v. Pacific Transport Co.,* 262 Fed. 951 (Cir. Ct. 2nd Cir.); *"The Daisy",* 282 Fed. 261 (Cir. Ct. 9th Cir.); *In re Tonawanda Iron & Steel Co.,* 234 Fed. 198 (Dist. Ct. New York); *Schirm v. Dene Steam Shipping Co.,* 222 Fed. 587 (Dist. Ct. New York); *"The Hilarius",* 163 Fed. 421 (Dist. Ct. N. Y.).

We submit that the above cases involve facts and circumstances sufficiently similar to the case at bar as to compel the conclusion that in this case plaintiff has entirely failed to prove a cause of action against the defendant and that the lower court

should have granted defendant's motion for judgment, and that this court should reverse the judgment of the lower court in plaintiff's favor.

D.

It Is a General Rule of Law That Negligence Cannot be Surmised or Conjectured or Left to Speculation From the Happening of an Accident, and That in the Absence of Facts Establishing Negligence the Court Must Award Defendant Judgment. This Rule Is Directly Applicable to This Case.

In *Patton v. Texas & Pacific Railway Co.*, 179 U. S. 658, 45 L. Ed. 361, it is said:

> "The fact of accident carried with it no presumption of negligence on the part of the employer; and it is an affirmative fact for the injured employee to establish that the employer has been guilty of negligence. *Texas & P. R. Co. v. Barrett,* 166 U. S. 617, 41 L. Ed. 1136, 17 Sup. Ct. Rep. 707. Second. That in the latter case it is not sufficient for the employee to show that the employer may have been guilty of negligence; the evidence must point to the fact that he was. And where the testimony leaves the matter uncertain and shows that any one of half a dozen things may have brought about the injury, for some of which the employer is responsible and for some of which he is not, it is not for the jury to guess between these half a dozen causes and find that the negligence of the employer was the real cause, when there is no satisfactory foundation in the testimony for that conclusion. If the employee is unable to adduce sufficient evidence to show negligence on the part of the employer, it is only one of the many cases in which the plaintiff fails in his testimony; and no mere sympathy for the unfortunate victim of an accident

justifies any departure from settled rules of proof resting upon all plaintiffs."

In *Southern Railway Co. v. Derr,* 240 Fed. 73 (Cir. Ct. 6th Cir.), it is said (p. 75):

" * * * and the case may not be submitted to the jury where there is at the most only a balanced probability that the actionable negligence existed."

The Circuit Court of Appeals for the Eighth Circuit, in *Armour & Co. v. Harcrow,* 217 Fed. 224, stated this rule as follows (p. 228):

"And where the evidence leaves the issue, whether or not an injury was caused by an act of negligence, to speculation, without substantial evidence to sustain the averment that it was, it is the duty of the court to instruct the jury to return a verdict for the defendant."

The same court said, in *Midland Valley R. Co. v. Fulgham,* 181 Fed. 91 (p. 95):

"Conjecture is an unsound and unjust foundation for a verdict. Juries may not legally guess the money or property of one litigant to another. Substantial evidence of the facts which constitute the cause of action in this case of the alleged defect in the lift pen lever and the coupler, is indispensable to the maintenance of a verdict sustaining it."

In *Payne v. Bucher,* 270 Fed. 38 (Cir. Ct. 3rd Cir.), it is said (p. 40):

"The fact of accident carries with it neither proof nor presumption of negligence on the part of the employer. Negligence of the em-

> ployer is an affirmative fact to be established by the one speaking for the deceased employee. (Citing cases.) Evidence that the employer may have been guilty of negligence is not sufficient."

So, likewise, in *Peirce v. Kile,* 80 Fed. 865 (Cir. Ct. 7th Cir.), it is said (p. 867):

> "The inference of negligence cannot be established by conjecture or speculation or drawn from a presumption but must be founded upon some established fact."

It should be noted that in all of the above cases a judgment in favor of the plaintiff was reversed on appeal by the Circuit Court of Appeals.

We submit that the doctrine of these cases is directly applicable to the case at bar, and that there is in this case no evidence of negligence whatsoever, and that negligence on the part of the defendant could only be conjectured or surmised or speculated upon. That the block actually fell and hit plaintiff is not sufficient; for in each of the above cases, just as in this one, there was an accident causing injury to the plaintiff, but the Circuit Court of Appeals nevertheless held in each instance that the evidence showed no negligence on the part of the defendant, and reversed the lower court's judgment in favor of plaintiff. So here the judgment in plaintiff's favor should be reversed for the same reason.

E.

Plaintiff Cannot Claim Herein the Benefit of the Doctrine of Res Ipsa Loquitur Because it is Ordinarily Not Applicable in Actions by Seamen for Injuries Received on Account of the Unseaworthiness of the Vessel or the Negligence of the Owners, or in Cases of Master and Servant Generally, and Even If the Doctrine Could Apply it Would Not Apply in This Case as Defendant Introduced Evidence Explaining the Cause of the Accident Which Evidence Was Not Overcome by Plaintiff.

At the trial plaintiff contended that the doctrine of *res ipsa loquitur* was applicable to this case, and was sufficient to support his cause of action. The lower court, in its opinion, agreed with this contention of plaintiff (Tr. p. 16). A review of the authorities shows that this was error. The following cases hold directly that in an action between master and servant, brought by the servant to recover damages from the master for injuries received in the former's employment, the doctrine of *res ipsa loquitur* is not applicable. *McDonnell v. Oceanic Steam Navigation Co.,* 143 Fed. 480 (Cir. Ct. 2nd Cir.); *"The Baron Innerdale",* 93 Fed. 492 (Dist. Ct. N. Y.); *Armour & Co. v. Harcrow,* 217 Fed. 224 (Cir. Ct. 8th Cir.); *Payne v. Bucher,* 270 Fed. 38 (Cir. Ct. 3rd Cir.); *Chicago & N. W. Ry. Co. v. O'Brien,* 132 Fed. 593 (Cir. Ct. 8th Cir.); *Northern Pacific Ry. Co. v. Dixon,* 139 Fed. 737 (Cir. Ct. 8th Cir.); *Midland Valley R. Co. v. Fulgham,* 181 Fed. 91 (Cir. Ct. 8th Cir.); *Cryder v. Chicago Ry. Co.,* 152 Fed. 417 (Cir. Ct. 8th Cir.).

This principle is sometimes expressed in another way, to the effect that in actions between employer

and employee the fact of the accident raises no presumption of negligence on the part of the employer, and the burden is on the employee, notwithstanding the accident, to prove that the employer was guilty of negligence which caused the injury. *Patton v. Texas & Pacific Ry. Co.,* 179 U. S. 658, 45 L. Ed. 361; *Peirce v. Kile,* 80 Fed. 865 (Cir. Ct. 7th Cir.); *Canadian Northern Ry. Co. v. Senske,* 201 Fed. 637 (Cir. Ct. 8th Cir.); *James Stewart & Co. v. Newby,* 266 Fed. 287 (Cir. Ct. 4th Cir.).

It is true that in a very extreme case the doctrine of *res ipsa loquitur* has even been applied between master and servant, but the courts have made it clear that the doctrine is never to be invoked where there is a possible explanation of the accident or where the accident may be the result of one of several causes or where the evidence is conflicting as to the cause of the accident. Thus in *Lucid v. E. I. Du Pont De Nemours Powder Company,* 199 Fed. 377, this Circuit Court of Appeals did apply the doctrine in an action between master and servant, but in so doing the court recognized the general rule, saying through Gilbert, J.,

> "The doctrine of *res ipsa loquitur* involves an exception to the general rule that negligence must be affirmatively shown, and is not to be inferred, *and the doctrine is to be applied only when the nature of the accident itself, not only supports the inference of the defendant's negligence, but excludes all others.*"

In that case the complaint alleged that plaintiff was injured by reason of the fact that defendant

had negligently stored dynamite and other high explosives, which subsequently exploded. The case came up on a judgment sustaining defendant's demurrer to the complaint. The facts in the complaint had to be taken as true, therefore, and the explosion of high explosives from negligent storage, in the absence of any evidence explaining the same, naturally presented an extreme state of facts justifying the application of the doctrine of *res ipsa loquitur*.

Likewise in *Central R. Co. of N. J. v. Peluso,* 286 Fed. 661 (Cir. Ct. 2nd Cir.), the doctrine was applied between master and servant, but the court made its position very clear as to when it considered *res ipsa loquitur* was to be applied, by making the following quotations from other cases, to wit:

McLoughlin, J., in *Francey v. Rutland R. R. Co.,* 222 N. Y. 482, 119 N. E. 86:

> "The action was tried and submitted to the jury on an erroneous theory as to the application of the rule of *res ipsa loquitur*. It is not a complicated rule, nor is there difficulty in applying it in a given case, when the reason for its adoption is understood. The phrase usually employed to express the rule, *res ipsa loquitur*—the thing speaks for itself—may at times tend to obscure rather than to make clear what the rule means. All that is meant is that the circumstances involved in or connected with an accident are of such an unusual character as to justify, *in the absence of any other evidence bearing upon the subject,* the inference that the accident was due to the negligence of the one having possession or control of the article or thing which caused the injury. This

inference is not drawn merely because the thing speaks for itself, but because all of the circumstances surrounding the accident are of such a character that *unless an explanation be given* the only fair and reasonable conclusion is that the accident was due to some omission of defendant's duty."

Justice Holmes, in *Southern Railway v. Bennett,* 233 U. S. 80, 85, 34 Sup. Ct. 566, 567 (58 L. Ed. 860):

"Of course the burden of proving negligence in a strict sense is on the plaintiff throughout, as was recognized and stated later in the charge. The phrase picked out for criticism did not controvert that proposition but merely expressed in an untechnical way that if the death was due to a defective instrumentality *and no explanation was given,* the plaintiff had sustained the burden. The instruction is criticized further as if the judge had said *res ipsa loquitur*—which would have been right or wrong according to the *res* referred to."

Justice Pitney in *Sweeney v. Erving,* 228 U. S. 233, 33 Sup. Ct. 416 (57 L. Ed. 815):

"The general rule in actions of negligence is that the mere proof of an 'accident' (using the word in the loose and popular sense) does not raise any presumption of negligence; but in the application of this rule, it is recognized that there is a class of cases where the circumstances of the occurrence that has caused the injury are of a character to give ground for a reasonable inference that if due care had been employed, by the party charged with care in the premises, the thing that happened amiss would not have happened. In such cases it is said, *res ipsa loquitur*—the thing speaks for

> itself—*that is to say, if there is nothing to explain or rebut the inference that arises from the way in which the thing happened,* it may fairly be found to have been occasioned by negligence."

In the present case there is evidence to explain the accident, to wit, that it was caused by the plaintiff himself in operating too violently the winch in order to untangle the cargo hook from the midship guy. Under such circumstances the cases last cited establish conclusively that the doctrine of *res ipsa loquitur* is not to be applied.

In conclusion we respectfully submit that:

1. Plaintiff's cause of action rested solely on the alleged absence of nosing across the mouth of the hook on the block which fell and hit plaintiff.

2. The burden of proof was on plaintiff to show such lack of nosing, and that it was the cause of his injury. Plaintiff introduced no evidence to prove the same, other than the happening of the accident. On the other hand defendant introduced evidence which tended to show that there was in fact the required nosing and further that the block was caused to fall and hit plaintiff by reason of his own negligence in operating too violently the winch in order to untangle the cargo hook from the midship guy. Plaintiff therefore failed to sustain the burden of proof.

3. In this case there is no presumption of negligence from the happening of the accident, and the doctrine of *res ipsa loquitur* is not applicable.

4. A review of cases involving injuries to seamen with facts similar or comparable to the facts of this case compels the conclusion that plaintiff herein failed to prove a cause of action against defendant and the court should have granted defendant's motion for judgment in its favor.

5. Negligence cannot be conjectured, surmised or left to speculation from the happening of the accident, and if there is no substantial fact showing negligence, there should be judgment for defendant, and if plaintiff is awarded judgment under such circumstances, the Circuit Court of Appeals will reverse the same.

6. Because of all of the foregoing the judgment appealed from herein should be reversed.

Dated, San Francisco,
October 11, 1924.

Respectfully submitted,

JONES & DALL,
Attorneys for Plaintiff in Error.

ESMOND SCHAPIRO,
Of Counsel.

No. 4286

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

HOBBS WALL & COMPANY
(a corporation),
Plaintiff in Error.

vs.

S. PETTERSON,
Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

H. W. HUTTON,
Attorney for Defendant in Error.

No. 4286

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

HOBBS WALL & COMPANY
(a corporation),
Plaintiff in Error,

vs.

S. PETTERSON,
Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR

I.

STATEMENT OF FACTS.

We respectfully state to the Court that the following statement on page 3 of plaintiff in error's brief is not in accordance with the record:

> "But on cross-examination admitted that he actually had not looked to see whether or not it had such nosing, either at the time it fell (Tr. p. 41) or at any time prior thereto" (Tr. p. 40).

We also call the Court's attention to the following on page 3 of said brief, to wit:

> "It was admitted that on a block in use on board ship it is customary and proper to have

> a nosing of rope yarn, marlin or wire tied across the mouth of the hook, in order to prevent the hook from jarring out of the eye."

That being the result of experience, the indisputable inference is, that the hook will not jar out if the nosing is there.

He did say on page 40 that he had not seen the block prior to its fall but stated distinctly that he looked at it when it fell and could see there had been no nosing on it. What he said on page 41 is as follows:

> "A. I did not look at it in particular for that; I picked it up and looked at it, and I says to myself, 'There should have been a nosing around that block.' "

We respectfully submit that he directly states in that answer that he looked at the block and concluded there was no nosing on it; the only part of his answer that qualifies that, is the first part, and all he says in that is that he did not pick it up for that particular purpose.

There is no insufficiency of evidence in this case, neither was there any speculation, and as to the motion for a judgment by plaintiff in error at the close of the case, the Court said, Tr. p. 59:

> "The COURT. The motion will be taken into consideration and the whole matter determined at one and the same time."

The Court did that by rendering judgment for plaintiff, and as to the motion itself it added noth-

ing to the case, the evidence was all in and it was for the Court to determine the whole case, motion or no motion, and it did.

The facts of the case show that plaintiff in error operated its vessel "Crescent City" for at least two years with an unused block dangling in a hook about 100 feet above the deck; the block had originally been a part of a wireless apparatus. Why it was left there does not appear; it appears to have been used twice in a few months—once when they painted the mast and another time when they used it to reeve signal halyards through to decorate the vessel with flags—but it was not a signal halyard block. The master of the vessel testified, Tr. p. 50:

> "That block is not the usual signal halyard block; they are much smaller sized."

In the meantime the ship rolled when at sea, when they were working cargo, or raising or lowering the booms, and the following was liable to happen. Testimony of the master of the vessel, page 50:

> "If there had been a nosing there it is possible for it to have been broken off by the severe vibration of the mast, such as would occur in loading or from shaking of the mast with the steam winch; a heavy sea might also do it, but this does not happen very often. This mast had been in use for three or four days in loading and had been vibrating during all this period. Such vibration might have affected or broken the nosing; I have never seen that happen, but it is liable to * * *."

Page 51:

> "In heavy rolling the block would roll from side to side. I am not prepared to say that it would not roll over on the marlin and chafe it. I don't think the block would shake up and down unless the hook was very slack. The mast rolls considerably when you are loading and unloading cargo."

On the day of the accident in this case they had finished loading cargo, and defendant in error was told to lower the booms which he proceeded to do.

The only thing in the record about his doing that work in an improper manner is that of the witness Selfridge, who was in his room writing a letter, and all he knows about it is that he thought the winch made a great deal of noise, Tr. pp. 52 and 53, but he said on cross-examination, pages 54 and 55:

> "Winches always make considerable clattering when they are used."

Page 55:

> "The mast always shakes when you are hoisting cargo; when you are hoisting cargo there is always a lot of shaking and noise and clattering on deck."

Defendant in error testified, page 43, that he was used to running winches.

And plaintiff in error's witness Sorenson testified that when the boom was half way down, the block at the head of the mast came down and struck defendant in error, that witness testifying on page 48:

> "You lower the booms by the tackle and that always causes the mast to shake, just the same as when you are hoisting cargo, that causes the mast to shake; at times it shakes considerably. The booms on the 'Crescent City' are probably 60 feet long; each load weighs a ton, and in hoisting a ton weight on a boom it is bound to shake the thing that it is suspended to. This goes on all the time on board ship. We were lowering the booms in the proper manner at the time the block came down, just the same as they were always in the habit of being lowered."

So with a block that was an unusued block about a foot from the top of the mast, where a person desiring to inspect it had to climb up twenty feet of mast away up in the air, and of course no one would so climb, and a block that was likely to have the nosing chafed off, they continued to run this vessel; we submit that was negligence of the grossest character; the nosing was bound to rot or chafe off some day; it had done so this day, otherwise the block could not have come down, and the accident happened.

The case was tried before the Court sitting without a jury; the Court saw the witnesses and heard them testify and made findings of fact which this Court will not disturb, and each finding of fact is supported by testimony. We call the Court's attention to the following, page 15:

> "It is obvious that a roll or careen of the ship will be magnified in sway or sweep of the mast tops. Hence the necessity to supply and

maintain guards or keepers on block hooks there suspended. This rolling or careening of the ship is ordinary, usual and anticipated. It is also clear that if this hook ever had a guard or keeper, it weathered and broke away at the time of the fall or prior thereto."

Page 16:

"In these circumstances, although it is probable plaintiff's conduct or acts caused the hook to escape the eye-bolt, it precipitated the fall. Such conduct or acts, though contributing to the block's fall, in legal contemplation are not the *cause* of the block's fall but only a *condition* thereof. * * *

The proximate cause was the absence or weakness of the guard or keeper, due to defendant's failure to discharge their duty, whether to make seaworthy with reasonable diligence to maintain."

That finding is supported by the evidence, plaintiff, page 36:

"The purpose of the nosing is to prevent the block from unhooking."

Page 42:

"A. Yes, it might be that there has been such a thing as a nosing on that block and that nosing has been torn out by hanging up there and swinging."

E. B. Butzing, the master of the vessel, defendant's witness, page 49:

"It is customary with a block like that to put a nosing around. The nosing is usually made of cord or marlin or rope yarn; they seldom put wire on it."

Two blocks were offered in evidence; they speak for themselves. The purpose of the nosing is apparent; if there is a nosing on the block it cannot jar out and fall.

Plaintiff, defendant in error, testified as follows:

> "I had never been up to where the block was on the mast; there was a block on the foremast, but not a block like this. It is not usual to have a block like that hanging on the foremast."

Same page:

> "The second mate on board a vessel does as the first mate and captain tell him to do; he is supposed to report if he sees anything wrong, or anything like that, which I did report, but the mate is the man that makes inspections and takes care of the general gear."

II.

ARGUMENT.

Plaintiff makes about one point, that is that defendant in error relied on the absence of a nosing, and that it was not proved. It is clear that if there had been a nosing the block could not have fallen out; an inspection of the block in evidence shows that.

The Court found that it was either the absence of or breaking of the nosing that caused the injury; that is conclusive, and anyone by looking at

the block would have sufficient evidence before him to conclude that.

Plaintiff in error overlooks several principles of evidence in its brief as follows:

> "Indirect evidence is that which tends to establish the fact in dispute by proving another, and which, though true, does not of itself conclusively establish that fact, but which affords an inference or presumption of its existence. * * *"

This block came down; the form of the hook on the block with its end turned up shows it is designed to hold a wire or other binding around it to stop the hook from jarring out of what it is suspended in; then similar blocks are in evidence. There are four kinds of evidence as follows:

> "The knowledge of the Court;
> The testimony of witnesses;
> Writings;
> Other material objects presented to the senses."

In this case we have the testimony of defendant in error that the block could not have fallen if there had been a nosing on it; that is also clear from the material objects presented to the senses in this case, the blocks themselves.

We also have the following, which is apparent, page 36:

> "That is a nosing that goes around the end of the block and this way (witness illustrating how nosing goes around the end of block). It

> can *never,* that is commonly done when they have blocks hanging up at any height, *come unhooked then.* The purpose of the nosing is to prevent the block from unhooking."

The evidence and findings herein are conclusive against plaintiff in error on that point.

But we have other grounds, Paragraph II of complaint, page 2 of transcript:

> "That at the time said vessel left the said State of California she was unseaworthy and her appliances were defective, as she had an unused, what is called a block, hanging on her mainmast about one hundred and ten feet above her deck."

That was negligence in itself to have a block in such a place, that was subject to the action of the weather, the rolling of the vessel and the increased rolling of the mast, and the excessive shaking of the mast when cargo was being laden or unladen; the nosing being of manila it was bound to wear out, chafe or rot, and the block was in such a place that no one would care to go up and inspect it. There is a charge of unseaworthiness, seaworthiness is reasonably safe. The block was unused; anything that is used for a temporary purpose twice in several months is an unused block; it had nothing to do with the unloading of the cargo or the operation of the vessel; it was simply dangling up there as the mast swayed or shook. This vessel was not reasonably or at all safe.

It was the duty of the mate to inspect the vessel; there is no evidence he ever did. Paragraph IV of complaint, page 3:

> "and it being so suspended without any fault on his part as it was the duty of the defendant by and through the master and mate of the vessel to keep vessel and her appliances and parts in order, and not the duty of the plaintiff."

The evidence of both defendant in error and the master of the vessel substantiate that allegation. And there does not seem to have been any inspection. It was for plaintiff in error to show it if there had been, but they failed to do so. There is no contradiction of the testimony that it is usual to have a nosing, and no contradiction of the testimony that the block would not have fallen if there had been a nosing.

III.

RES IPSA LOQUITUR.

The Court did not apply that doctrine to this case, but could have done as plaintiff in error claims defendant in error produced no evidence, as there is one unvarying rule that when anything falls, the burden rests upon the party under whose control it is to explain the falling. The mere falling makes out a case.

There is little if any difference between this and the following cases. In the case of *The Joseph B. Thomas,* 86 Fed. 658, someone had placed a bucket on a hatchway cover that was liable to tip; someone stepped on the hatch cover, it tipped, and the bucket fell down into the hold and struck a man. And this Court said on page 662:

> "But it often happens that the evidence which shows the injury and the manner in which it occurred, also establishes a prima facie case of negligence, and raises such a strong presumption as to cast upon the opposite party of introducing proof of other facts in order to show that there was no negligence."

In this case a block had been left suspended for, as far as we can learn, about two years on a mast that all the evidence showed jarred, rolled and shook at about all times in port when cargo was being handled, booms lowered, or other work done; and at sea by the rolling of the vessel. There was no necessity for the block to have been there. Anyone might have known that it would fall some day, and it did fall. If defendant in error had been a few inches from where he was it would have killed him. This Court further said, on page 663:

> "But it was not the covers, nor the person that stepped on the covers, that was the real cause of the injury. You can twist and turn the facts in any direction which the ingenuity and ability of counsel may suggest, but the mind is inevitably forced to the conclusion that it was the negligent placing of the keg in a dangerous position that constituted the efficient

> cause of the injury. It was the natural result which, in the light of the attending circumstances, the appellants ought to have foreseen might occur when the keg was placed upon the covers; and on which, by the exercise of ordinary care and prudence, they should have guarded against. They were required to use such precautions to avoid danger as a person of ordinary prudence would use for his own protection. It makes no difference whether it was a man or a dog that ran against or stepped upon the covers, or whether it was a jar occasioned by the falling of a heavy box, or a gale of wind. It was the placing of the keg in such a position that it was liable to be upset from any of these causes that constitutes the negligence and creates the liability, notwithstanding the fact that there were other causes which may have immediately or remotely contributed to the accident."

There is no reason this block could not have been taken down and replaced each time they wanted to use it. If they had left the halyards in it that would have kept it in place, but they did not.

In the following case decided by the United States Circuit Court of Appeals for the Second Circuit, December 3, 1923 *(The Marschall,* Vol. II American Maritime Cases No. 2, page 144), a topping lift fell, and the Court says:

> "The falling of the topping lift in the manner described raises a presumption of negligence, and the doctrine of *res ipsa loquitur* applies. (Central R. R. Co. v. Pelusa, 286 Fed. 661.) In that case, this Court recently had occasion to review the Federal as well as the

> New York State authorities on this subject." * * * Page 146.
>
> "We think that from the break occurring in the manner described it presumptively appears that the appellant failed in its duty to keep the band and ring in proper condition."
>
> *Jager v. California Bridge Company,* 104 Cal. 542;
>
> *Dyas v. Southern Pacific Co.,* 140 Cal. 296.

Defendant in error testified (Tr. page 36) that there had not been any nosing on the block; and on page 35,

> "The block had nothing to do with the booms. I don't know what the block was there for."

The master of the vessel testified, page 58,

> "I don't know whether the block was originally there for wireless. The block was within a foot or two of the top of the mast. I don't know what the block was there for originally."

It seems idle for counsel to claim that there is no evidence that there was no nosing on the block. Defendant in error testified there was none, as above, but the circumstances show it just as conclusively.

Counsel claims that the doctrine of *res ipsa loquitur* does not apply (page 21 of their brief):

> "And even if the doctrine could apply it would not apply in this case, as defendant introduced evidence explaining the cause of the accident, which evidence was not overcome by plaintiff."

We assume they refer to the evidence given by the witness Selfridge. All that he testified to was that he heard a noise; whether the noise was before, after, or at the time the block fell he does not know, as all he knows about the accident was what someone told him after it occurred. We submit that his evidence is not proof of anything, and does not explain anything.

We respectfully submit that the record in this case is without error, and ask that the judgment be affirmed.

Dated, San Francisco,
November 5, 1924.

H. W. Hutton,
Attorney for Defendant in Error.

No. 4290

United States

Circuit Court of Appeals

For the Ninth Circuit.

ROY WARD and OTTO PETERSON, Copartners Doing Business Under the Firm Name of WARD & PETERSON, Copartners,

Appellants,

vs.

SHOPE BRICK COMPANY, a Corporation,

Appellee.

Transcript of Record.

Upon Appeal from the United States District Court for the District of Oregon.

No. 4290

United States

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INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS OF RECORD.

JOSEPH L. ATKINS and LEICESTER B. ATKINS, Chamber of Commerce Building, Portland, Oregon,

For the Appellants.

ROBERT R. RANKIN, Platt Building, Portland, Oregon,

For the Appellee.

CITATION ON APPEAL.

United States of America,
District of Oregon,—ss.

To Shope Brick Company, a Corporation, GREETING:

WHEREAS, Roy Ward and Otto Peterson, Copartners doing business under the firm name of Ward & Peterson, copartners, have lately appealed to the United States Circuit Court of Appeals for the Ninth Circuit from a decree rendered in the Circuit Court of the United States for the District of Oregon, in your favor, and has given the security required by law;

YOU ARE therefore, hereby, cited and admonished to be and appear before said United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, within thirty days from the date hereof, to show cause, if any there be, why the said decree should not be corrected, and speedy

justice should not be done to the parties in that behalf.

GIVEN under my hand, at Portland, in said District, this 14th day of June, in the year of our Lord one thousand nine hundred and twenty-four.

R. S. BEAN,
Judge.

Due service of the foregoing citation on appeal is hereby admitted this 14th day of June, 1924.

ROBERT R. RANKIN,
Attorney for Shope Brick Company. [1*]

[Endorsed]: No. E–8661. 34–1. In the District Court of the United States for the District of Oregon. Shope Brick Company, a Corporation, Plaintiff, vs. Roy Ward and Otto Peterson, Individually, and Roy Ward and Otto Peterson, Copartners, Doing Business Under the Firm Name of Ward & Peterson, Copartners, Defendants. Citation on Appeal. U. S. District Court, District of Oregon. Filed Jun. 1, 1924. G. H. Marsh, Clerk. [2]

In the District Court of the United States for the District of Oregon.

July Term, 1923.

BE IT REMEMBERED, That on the 4th day of August, 1923, there was duly filed in the District Court of the United States for the District of Oregon, a bill of complaint, in words and figures as follows, to wit: [3]

*Page-number appearing at foot of page of original certified Transcript of Record.

In the District Court of the United States for the District of Oregon.

SHOPE BRICK COMPANY, a Corporation,
Complainant,

vs.

ROY WARD and OTTO PETERSON, Individually, and ROY WARD and OTTO PETERSON, Copartners, Doing Business Under the Firm Name and Style of WARD & PETERSON, Copartners,
Defendants.

BILL OF COMPLAINT.

To the Honorable Judges of the United States District Court for the District of Oregon.

The Shope Brick Company, an Oregon corporation, brings this, its bill of complaint, against Roy Ward and Otto Peterson, individually and as copartners, and having cause of suit against said defendants, complains and alleges as follows, to wit:

I.

The Shope Brick Company is a corporation organized under and existing by virtue of the laws of the State of Oregon, with its principal office and place of business located in the city of Portland, county of Multnomah, State of Oregon; that Roy Ward and Otto Peterson are residents of the city of Portland, county of Multnomah, State and District of Oregon, and as partners have been and now are engaged in the business of manufacturing ce-

ment brick, both common and color faced, and hearth tile at their plant at No. 1751 East 9th Street, in the city of Portland, county of Multnomah, State of Oregon, and have been operating as a copartnership under the assumed name and style of Ward & Peterson.

II.

That prior to the 9th day of October, 1909, David F. Shope, then being a citizen of the United States, residing at St. Paul, in the county of Ramsey, and State of Minnesota, was the true, first sole and original inventor or discoverer of certain [4] new and useful improvements in processes or methods of waterproofing cement blocks, not known or used by others in this country, not patented or described or illustrated in any printed publication in this or any foreign country before his invention or discovery thereof, or more than two years prior to his hereinafter mentioned application for letters patent of the United States therefor, and not in public use or on sale for more than two years prior to said application; which improvements had not been abandoned; and that no application for letters patent of any foreign country for said invention or discovery was filed by him or his legal representatives or assigns more than twelve months prior to said filing of the application therefor in the United States.

III.

That on the 9th day of October, 1909, the said David F. Shope, being then as aforesaid, the true, first, sole and original inventor or discoverer of the

said improvements in brick making, and being then a citizen of the United States, made due application in writing to the Commissioner of Patents of the United States for the grant of letters patent for the aforesaid improvements, and paid the fees required by the law therefor, and duly complied in all respects with all the conditions and requirements of then existing statutes of the United States and the rules of the Patent Office of the United States in such cases made and provided; and that said application was known and described as serial No. 521,796.

IV.

That prior to the 28th day of November, 1917, David F. Shope, then being a citizen of the United States, residing then at Portland, Oregon, was the true, first, sole and original inventor or discoverer of other certain new and useful improvements in processes of waterproofing and ornamenting objects such as cement blocks, not known or used by others in this country, not patented, [5] or described, or illustrated in any printed publication in this or any foreign country before his invention or discovery thereof, or more than two years prior to his hereinafter mentioned application for letters patent of the United States therefor, and not in public use or on sale for more than two years prior to said application; which improvements had not been abandoned; and that no application for letters patent of any foreign country for said invention or discovery was filed by him or his legal representatives or assigns, more than twelve months

prior to said filing of the application therefor in the United States.

V.

That on the 28th day of November, 1917, the said David F. Shope, being then as aforesaid, the true, first, sole and original inventor or discoverer of the said improvements in processes of waterproofing and ornamenting objects, and being then a citizen of the United States, made due application in writing to the Commissioner of Patents of the United States for the grant of letters patents for the aforesaid improvements, and paid the fees required by the law therefor, and duly complied in all respects with all the conditions and requirements of then existing statutes of the United States and the rules of the Patent Office of the United States in such cases made and provided; and that said application was known and described as serial No. 204,320.

VI.

That prior to the 13th day of June, 1917, David F. Shope, then being a citizen of the United States, residing at Portland, Oregon, was the true, first, sole and original inventor or discoverer of certain new and useful improvements in brick-making machines, not known or used by others in this country, not patented, or described, or illustrated in any printed publication in this or any [6] foreign country before his invention or discovery thereof, or more than two years prior to his hereinafter mentioned application for letters patent of the United States therefor, and not in public use or on sale for more than two years prior to said application;

which improvements had not been abandoned; and that no application for letters patent of any foreign country for said invention or discovery was filed by him or his legal representatives or assigns more than twelve months prior to said filing of the application therefor in the United States.

VII.

That on the 13th day of June, 1917, the said David F. Shope, being then as aforesaid, the true, first, sole and original inventor or discoverer of the said improvements in brick-making machines, and being then a citizen of the United States, made due application in writing to the Commissioner of Patents of the United States for the grant of letters patents for the aforesaid improvements, and paid the fees required by the law therefor, and duly complied in all respects with all the conditions and requirements of then existing statutes of the United States and the rules of the Patent Office of the United States in such cases made and provided; and that said application was known and described as serial No. 174,511.

VIII.

That on the 28th day of February, 1911, upon due proceedings and in full compliance with the statutes of the United States in such cases made and provided, letters patent of the United States, bearing date on that day, and numbered 985,709, were issued on said application serial No. 521,796, to said David F. Shope, his heirs or assigns, under the seal of the Patent Office of the United States; were signed by the Commissioner of Patents; were recorded in the

books of the Patent Office kept for that [7] purpose; and were delivered to said David F. Shope, for the term of seventeen years from the 28th day of February, 1911, granting the exclusive right to make, use and sell the said invention throughout the United States and the territories thereof; and the plaintiff prays that said letters patent may be deemed and taken as part of this bill; and to the original of the same, or a duly authenticated copy thereof, ready in court to be produced, the plaintiff prays leave to refer.

IX.

That by an instrument in writing, duly executed and delivered on or about the —— day of May, 1911, and recorded in the United States patent office on the 15th day of May, 1911, in Liber X86 of Transfers of Patents, and for a valuable consideration, the said David F. Shope sold and assigned the entire right, title and interest in and to said letters patent 985,709, together with all the rights or causes of action for any damages that may have accrued to him by virtue of said letters patent or the infringement thereof, to the Shope Brick Company, of Portland, Oregon, a corporation of Oregon, the plaintiff herein; and the plaintiff prays that said instrument in writing may be deemed and taken as a part of this bill, and to the original of the same, or to a duly authenticated copy thereof, ready in court to be produced, the applicant prays leave to refer.

X.

That by an instrument in writing duly executed and delivered on or about the —— day of June, 1918, and recorded in the United States patent office on

the 18th day of June, 1918, in Liber B105 of Transfers of Patents, and for a valuable consideration, the said David F. Shope sold and assigned the entire right, title and interest in and to said application, serial No. 204,320, and the letters patent that might be granted thereon, to the Shope [8] Brick Company of Portland, Oregon, the plaintiff herein, and a corporation of Oregon; and the plaintiff prays that said instrument in writing may be deemed and taken as a part of this bill and the original of the same, or to a duly authenticated copy thereof, ready in court to be produced, the plaintiff prays leave to refer.

XI.

That on the 25th day of June, 1918, upon due proceedings had and in full compliance with the statutes of the United States in such cases made and provided, letters patent of the United States, bearing date on that day, and numbered 1,270,450, were issued, on said application serial No. 204,320, to said David F. Shope, his heirs or assigns, under the seal of the Patent Office of the United States; were signed by the Commissioner of Patents; were recorded in the books of the Patent Office kept for that purpose; and were delivered to said David F. Shope, for the term of seventeen years from the 25th day of June, 1918, granting the exclusive right to make, use and sell the said invention throughout the United States and the territories thereof; and the plaintiff prays that said letters patent may be deemed and taken as part of this bill; and to the original of the same, or a duly authenticated

copy thereof, ready in court to be produced, the plaintiff prays leave to refer.

XII.

That by an instrument in writing duly executed and delivered on or about the —— day of ——, ——, and recorded in the United States Patent Office on the 17th day of May, 1919, in Liber D107 of Transfers of Patents, and for a valuable consideration, the said David F. Shope sold and assigned the entire right, title and interest in and to said application, serial No. 174,511, and the letters patent that might be granted thereon, to the said [9] Shope Brick Company, the plaintiff herein; and the plaintiff prays that said instrument in writing may be deemed and taken as a part of this bill and to the original of the same, or to a duly authenticated copy thereof, ready in court to be produced, the plaintiff prays leave to refer.

XIII.

That on the 17th day of June, 1919, upon due proceedings had and in full compliance with the statutes of the United States in such cases made and provided, letters patent of the United States bearing date on that day, and numbered 1,306,977, were issued on said application, serial No. 174,511 made by David F. Shope, to said Shope Brick Company of Portland, Oregon, under the seal of the Patent Office of the United States; were signed by the Commissioner of Patents; were recorded in the books of the Patent Office kept for that purpose; and were delivered to said Shope Brick Company, its successors and assigns, for the term of seventeen

years from the 17th day of June, 1919, granting the exclusive right to make, use and sell the said invention throughout the United States and the territories thereof; and the plaintiff prays that said letters patent may be deemed and taken as part of this bill; and to the original of the same, or a duly authenticated copy thereof, ready in court to be produced, the plaintiff prays leave to refer.

XIV.

That the plaintiff has been ever since the respective dates of the said instruments in writing assigning said patent applications and said patents to the plaintiff, and during the time of the infringement hereinafter complained of, and now is, the sole and exclusive owner of said letters patent Nos. 985,709, 1,270,450 and 1,306,977, and is entitled to all the rights, interest and privileges accrued thereby, and to all damages and profits for any [10] and all infringements thereof.

XV.

That said defendants, well knowing the premises and having had knowledge of the letters patent No. 985,709, 1,270,450 and 1,306,977, and the rights secured to your orator, as aforesaid, by contriving to injure complainant and to deprive it of the benefits and advantages which might and otherwise would accrue unto complainant from said invention after the issuing of the letters patent above described, and after vesting of same in your complainant, as aforesaid, and before the commencement of this suit, did, as your orator is informed and believes, without the license and allowance and against the will of your orator and in violation of complainant's rights and

in infringement of the aforesaid letters patent, within the District of Oregon, and particularly at the plant of said defendants in the city of Portland, county of Multnomah, State of Oregon, unlawfully and wrongfully and in defiance of the rights of complainant, manufacture and/or use and/or sell, and are now continuing to manufacture, use and/or sell and assist or aid others to use, and now continue to use, aid, sell and/or assist others to use plaintiff's said patented methods, apparatus, processes and brick-making machines and faced brick and cement blocks, all of which have been made according to and contain said invention and patented processes, mentioned and described in said patents, or containing or embodying or employing the improvements, or substantial or material parts thereof in defiance of the rights acquired by and secured exclusively to your complainant by said patents.

XVI.

Said defendants have made and realized profits and advantages from said acts and doings and but for which said unlawful and wrongful acts of defendants, the complainant would have made [11] additional gains, profits and advantages from the use of said patented improvements and would now be enabled to use the same patented improvements with greater profit and advantage, but to what extent and how much exactly, your orator does not know and prays a discovery thereof.

XVII.

Complainant has caused notice to be given to said defendants of said infringements and of the rights of your orator in the premises and requested them to desist and refrain therefrom; but the said defend-

ants have disregarded said notice and refused to desist from said infringements, and are continuing to use said new and useful invention and/or improvements thereon.

XVIII.

Defendants are now making faced brick, which are themselves and the means of making them are covered by patents hereinabove described, and now are intending to and are making faced bricks other than for your orator; and further the said defendants have avowed that they intend to continue said infringement by the making of said brick in other sections of the State of Oregon, to wit, Astoria, and in other sections of the United States, to wit, at Longview, Washington; and the acts and doings above described constitute a direct infringement of the patents above mentioned; that in and by reason of the above-described acts of said defendants, your orator has been particularly damaged in the sum of One Thousand Dollars ($1000.00).

WHEREFORE, inasmuch as your orator has no adequate relief except in this court of equity, prays to the end that defendants

(1) May, if they can show cause why the plaintiff should not have the relief herein prayed, and shall make full, true and perfect disclosure, answer and discovery of all the matters aforesaid, [12] but not under oath, answer under oath being expressly waived, according to their best knowledge, remembrance, information and belief, as to the several matters herein set forth, as fully and particularly as if the same were herein repeated paragraph by paragraph, and the defendants interrogated thereon.

(2) May be compelled, by decree of this honorable Court, to account for and pay over unto the complainant, all gains and profits as have accrued or been earned or received by said defendants by reason of said infringement of said patents, and all such gains and profits as the complainant would have received but for the said wrongful acts and doings of said defendants, and all damages that the plaintiff has sustained thereby in, to wit, the sum of $1000.00.

(3) That said brick now in defendants' possession should be held and retained in the possession of the Court to be either finally destroyed or placed in possession of your orator.

(4) That said defendants and their agents, attorneys, servants, employees, and any and all persons acting by, through or under said defendants or their attorneys, may be perpetually enjoined and restrained by a decree of this Honorable Court from directly or indirectly using or causing to be used, any faced brick or devices or processes or structures or methods embodying or employing or according to the processes of said patented inventions or a substantial or material part thereof, or from infringing upon or violating said letters patent.

(5) That said defendants may be enjoined and restrained *pendente lite* by a writ of provisional or preliminary injunction, issuing out of and under the seal of this Honorable Court, to the same purport and tenor and effect as herein prayed for with regard to said perpetual injunction.

(6) That this Honorable Court may increase the actual [13] damages so assessed to a sum equal to three times the amount so assessed under the cir-

cumstances of the wilful and unjust infringements by said defendants, as herein set forth; and

(7) That said defendants may be decreed to pay the costs and disbursements of this suit; and that plaintiff may have such other, further and different relief as to this Court may seem meet and just in equity.

SHOPE BRICK COMPANY.
By D. F. SHOPE,
President.

ROBERT R. RANKIN,
Solicitor for Plaintiff.

Filed August 4, 1923. G. H. Marsh, Clerk. [14]

AND AFTERWARDS, to wit, on the 27th day of August, 1923, there was duly filed in said court an answer, in words and figures as follows, to wit: [15]

In the District Court of the United States for the District of Oregon.

IN EQUITY—No. E.—8661.

SHOPE BRICK COMPANY, a Corporation,
Complainant,

vs.

ROY WARD and OTTO PETERSON, Individually, and ROY WARD and OTTO PETERSON, Copartners, Doing Business Under the Firm Name and Style of WARD & PETERSON, Copartners,

Defendants.

ANSWER.

The joint and several answers of the defendants Roy Ward and Otto Peterson, individually and as copartners, doing business under the firm name and style of Ward & Peterson.

I.

The defendants admit that they are residents of the city of Portland, county of Multnomah, State and District of Oregon and as partners have been and now are engaged in the business of manufacturing cement brick, both common and color faced, and hearth tile at their plant at No. 1751 East Ninth Street in the city of Portland, county of Multnomah, State of Oregon, and have been operating as a copartnership under the assumed name and style of Ward & Peterson; but as to whether Shope Brick Company is a corporation organized under and existing by virtue of the laws of the State of Oregon, with its principal office and place of business located in the city of Portland, County of Multnomah, State of Oregon, the defendants are without knowledge.

II.

The defendants deny that prior to the 9th day of October, 1909, or at any time, David F. Shope was the true, first, sole or original inventor or discoverer of any new or useful improvements in processes or methods of waterproofing cement blocks, which were not known or used by others in this country, or which were not patented or described or illustrated in any printed publication [16] in this or any foreign country before the alleged invention or discovery thereof, or more than two years prior to the

alleged application for letters patent of the United States therefor, or which were not in public use or on sale for more than two years prior to said application; the defendants deny any knowledge as to whether said alleged improvements had not been abandoned; and the defendants deny that David F. Shope was or has ever been the true or first or sole or original inventor or discoverer of any new or useful improvement whatsoever in processes or methods of waterproofing cement blocks.

As to whether no application for letters patent of any foreign country for said alleged invention or discovery was filed by the said David F. Shope or his legal representatives or assigns more than twelve months prior to the filing of the application therefor in the United States, the defendants have no knowledge and therefore deny the same.

III.

The defendants deny that on the 9th day of October, 1909, or at any time, David F. Shope was the true, first, sole, or original inventor or discoverer of any improvements whatsoever in brick making, and deny that said David F. Shope on the 9th day of October, 1909, or at any time, made any application in writing or otherwise to the Commissioner of Patents of the United States or otherwise for the grant of letters patent for any improvements in processes or methods of waterproofing cement blocks or for any improvements in brick making.

The defendants admit that said David F. Shope, on the 9th day of October, 1909, made application for letters patent of the United States for alleged improvements in methods of waterproofing cement blocks and that said application was known and de-

scribed as serial No. 521796, but as to whether the said David F. [17] Shope paid the fees required by law therefor, the defendants have no knowledge; the defendants deny that in making or filing said application, serial No. 521,796, the said David F. Shope duly or at all complied with the conditions or requirements of the then existing statutes of the United States or the rules of the Patent Office of the United States.

IV.

The defendants deny that, prior to the 28th day of November, 1917, or at any time, David F. Shope was the true, first, sole, or original inventor or discoverer of any new or useful improvements in processes of waterproofing or ornamenting objects such as cement blocks, which were not known or used by others in this country, or which were not patented or described or illustrated in any printed publication in this or any foreign country prior to the alleged invention or discovery thereof, or more than two years prior to the application for letters patent of the United States therefor, or which were not in public use or on sale for more than two years prior to said application; the defendants deny any knowledge as to whether said alleged improvements had not been abandoned; and the defendants deny that David F. Shope was or has been at any time the true or first or sole or original inventor or discoverer of any new or useful improvements in processes of waterproofing or ornamenting objects or objects such as cement blocks.

As to whether no application for letters patent of any foreign country for said alleged invention or discovery in processes of waterproofing and orna-

menting objects such as cement blocks was filed by the said David F. Shope or his legal representatives or assigns more than twelve months prior to the filing of the said alleged application therefor in the United States, the defendants have no knowledge and therefore deny the same. [18]

V.

The defendants deny that on the 28th day of November, 1917, or at any other time, David F. Shope made any application in writing or otherwise to the Commissioner of Patents of the United States, or otherwise, for the grant of letters patent for any improvement in processes of waterproofing or ornamenting objects or objects such as cement blocks.

The defendants admit that the said David F. Shope, on the 29th day of November, 1917, made application for letters patent of the United States for alleged improvements in processes of waterproofing and ornamenting objects such as cement blocks, and that said application was known and described as serial No. 204,320, but as to whether the said David F. Shope paid the fees required by law therefor the defendants are without knowledge; the defendants deny that David F. Shope in making or filing said application, serial No. 204,320, duly or at all complied with the conditions or requirements of the then existing statutes of the United States or the rules of the Patent Office.

VI.

The defendants deny that prior to the 13th day of June, 1917, or at any other time, David F. Shope was the true, first, sole, or original inventor or discoverer of any new or useful improvements in brick-making machines, which were not known or used by

others in this country, or which were not patented or described or illustrated in any printed publication in this or any foreign country before his alleged invention or discovery thereof, or more than two years prior to his alleged application for letters patent of the United States therefor, or which were not in public use or on sale for more than two years prior to said alleged application; the defendants deny any knowledge as to whether said alleged improvements had not been abandoned; and the defendants deny that [19] David F. Shope was or has been at any time the true or first or sole or original inventor or discoverer of any new or useful improvements in brick-making machines.

As to whether no application for letters patent of any foreign country for said alleged invention or discovery of improvements in brick-making machines was filed by the said David F. Shope, or his legal representatives or assigns, more than twelve months prior to said application therefor in the United States, the defendants have no knowledge and therefore deny the same.

VII.

The defendants deny that on the 13th day of June, 1917, or at any other time, David F. Shope made any application in writing or otherwise to the Commissioner of Patents of the United States or otherwise for the grant of letters patent for any improvements in brick-making machines.

The defendants admit that said David F. Shope, on the 13th day of June, 1917, made application for letters patent of the United States for alleged improvements in brick-making machines and that said application was known and described as

serial No. 174,511, but as to whether the said David F. Shope paid the fees required by law therefor the defendants are without knowledge; the defendants deny that in making or filing application, David F. Shope duly or at all complied with the conditions or requirements of the then existing statutes of the United States, or the rules of the Patent Office of the United States, in such cases made and provided.

VIII.

The defendants admit that on the 28th day of February, 1911, letters patent of the United States bearing date on that day and numbered 985,709 were issued on said application serial No. 521,796 to David F. Shope; the defendants deny that said letters patent [20] were issued upon due proceedings or in full or any compliance with the statutes of the United States in such cases made and provided; but as to whether said letters patent were issued under the seal of the Patent Office of the United States or were signed by the Commissioner of Patents, or were recorded in the books of the Patent Office kept for that purpose, or were delivered to said David F. Shope for the term of 17 years, or for any other term, the defendants have no knowledge and therefore deny the same.

The defendants deny that any valid letters patent were issued or delivered to the said David F. Shope at any time, on said application serial No. 521,796 or otherwise, and in regard thereto the defendants allege that said alleged letters patent No. 985,709 at the time they were issued were and ever since have been and now are null and void; and the defendants deny that said alleged letters patent No. 985,709

granted the exclusive or any right to make or use or sell the alleged invention or discovery mentioned therein throughout the United States or the territories thereof or in any part thereof or in the State of Oregon or in the State of Washington.

IX.

The defendants have no knowledge as to whether the said David F. Shope at any time sold or assigned to the complainant herein the entire or any right, title or interest of the said David F. Shope in or to said letters patent No. 985,709 or all or any of the alleged right or alleged cause of action for damages that may have accrued to said David F. Shope by virtue of said letters patent or alleged infringements thereof; and the defendants further deny that the complainant has ever become or now is the owner of any rights whatsoever under and by virtue of the said letters patent No. 985,709.

X.

As to whether at any time the said David F. Shope sold [21] or assigned the entire or any right, title or interest in and to said application serial No. 204,320, or the letters patent that might be granted thereon to the complainant herein, the defendants have no knowledge and therefore deny the same.

XI.

The defendants admit that on the 25th day of June, 1918, letters patent of the United States bearing date on that day and number 1,270,450 were issued on said application serial No. 204,320 to David F. Shope; the defendants deny that said letters patent were issued upon due proceedings or in full or any compliance with the statutes of the United States in such cases made and provided; but as to whether

the said letters patent were issued under the seal of the Patent Office of the United States, or were signed by the Commissioner of Patents, or were recorded in the books of the Patent Office kept for that purpose, or were delivered to the said David F. Shope for the term of 17 years, or for any other term, from the 25th day of June, 1918, the defendants have no knowledge and therefore deny the same.

The defendants deny that any valid letters patent were issued or delivered to the said David F. Shope at any time on said application serial No. 204,320 or otherwise; and in regard thereto the defendants allege that said letters patent No. 1,270,450 at the time they were issued were and ever since have been and now are null and void; and the defendants deny that said alleged letters patent No. 1,270,450 granted the exclusive or any right to make or use or sell the alleged invention throughout the United States or the territories thereof, or in any part thereof, or in the State of Oregon or in the State of Washington.

XII.

As to whether at any time the said David F. Shope sold or assigned to the complainant the entire or any right, title or [22] interest in or to said application serial No. 174,511 or to the letters patent that might be granted thereon, the defendants have no knowledge and therefore deny the same.

XIII.

The defendants admit that on the 17th day of June. 1919, letters patent of the United States, bearing date on that day and numbered 1,306,977 were issued on application serial No. 174,511 to the complainant; the defendants deny that said letters patent were issued upon due proceedings had *or* in

full or any compliance with the statutes of the United States in such cases made and provided; but as to whether said letters patent were under the seal of the Patent Office of the United States, or were signed by the Commissioner of Patents, or were recorded in the books of the Patent Office kept for that purpose, or were delivered to the complainant, its successors or assigns, for the term of 17 years, or for any other term, from the 17th day of June, 1919, the defendants have no knowledge.

The defendants deny that any valid letters patent were issued or delivered to the complainant or to any other person on said application serial No. 174,511 or otherwise, and in regard thereto the defendants allege that said letters patent No. 1,306,977 at the time they were issued were and ever since have been and now are null and void; and the defendants deny that said alleged letters patent No. 1,306,977 granted the exclusive or any right to make or use or sell the said alleged invention throughout the United States or the territories thereof, or in any part thereof or in the State of Oregon, or in the State of Washington.

XIV.

As to whether the complainant has been at any time or is now the sole or exclusive owner of said alleged letters patent No. 985,709, No. 1,270,450 and No. 1,306,977, or either or any thereof, [23] or of any right, title or interest therein, the defendants have no knowledge and therefore deny the same.

The defendants deny that the complainant is en-

titled to any rights, interest or privileges under or accrued under said alleged letters patent or any thereof or to any damages or profits for any infringements thereof.

XV.

The defendants deny that they or either of them have at any time infringed or now are infringing on the alleged letters patent mentioned in complainant's bill, or any thereof, or on the pretended rights of complainant thereunder in the District of Oregon or in or at any other place.

The defendants deny that they or either of them have had at any time or now have any knowledge of any rights secured to the complainant by reason of the said alleged letters patent, and deny that the defendants or either of them have *contrived* at any time to injure the complainant or to deprive it of any benefits or advantages which might or would or could accrue unto complainant from said alleged patents or said alleged inventions.

The defendants deny that they or either of them have in violation of any rights of complainant or in any infringement of the aforementioned letters patent, within the District of Oregon or at the defendant's plant in the city of Portland, or in or at any other place whatsoever, manufactured or used or sold or assisted or aided others to use any of complainant's alleged patented methods, apparatus, process, brick-making machines, or faced bricks or cement blocks, or any patent methods or processes of the complainant whatsoever; the defendants deny that they or either of them are now continuing to

manufacture, use, or sell, or are continuing to assist or aid others to use any of complainant's alleged patented methods, apparatus, processes, brick-making machines, [24] or faced bricks or cement blocks or any of complainant's alleged patent methods or processes whatsoever; the defendants deny that they or either of them have at any time manufactured or used or sold or aided or assisted others to use any of complainant's alleged patent methods, apparatus, processes, brick-making machines, or faced brick or cement blocks, any of which have been made in any manner according to or which contain any alleged inventions or patented processes mentioned or described in the patents mentioned in complainant's bill, or containing or embodying or employing any of the improvements or substantial or material parts thereof, in defiance of any rights acquired by and secured to the complainant by said patents, or otherwise.

XVI.

The defendants deny that they or either of them have made or realized any profits or advantages whatsoever from the alleged or any infringement of complainant's alleged patents or either or any thereof; the defendants deny that but for any acts of the defendants or either of them the complainant would have made additional gains or profits or advantages from the use of the alleged patented improvements mentioned in its bill of complaint; and the defendants deny that but for any acts of theirs the complainant would now be enabled to use the alleged patented improvements with greater or any profits or advantage.

XVII.

The defendants admit that the complainant has attempted to force the defendants to desist and refrain from engaging in the business now conducted by the defendants in the city of Portland and that the defendants have disregarded said notice, but the defendants deny that they or either of them have used at any time or are continuing to use any new or useful inventions or improvements belonging to complainant or any other person. [25]

XVIII.

The defendants admit that they are now making faced brick and are intending to continue to make faced brick, but the defendants deny that any faced brick made or intended to be made by them were or are or will be covered by any of the patents set forth in complainant's bill or by any other patents whatsoever; the defendants deny that the means of making their faced brick are covered by any of the patents mentioned in complainant's bill; the defendants deny that they or either of them intend to infringe at any place any patent rights belonging to complainant or to any other person or that they have avowed that they intend so to do; the defendants deny that any acts or doings of theirs or either of them constitute a direct or any infringement of the patents mentioned in complainant's bill; the defendants deny that the complainant has by any acts of theirs or either of them in any manner been damaged in the sum of $1000.00, or in any other sum whatsoever.

XIX.

And defendants further answering, deny that

David F. Shope was the true, original or first inventor or discoverer of the alleged improvements in processes or methods of waterproofing cement blocks covered by said patent No. 985,709; and they further aver that said methods and processes and alleged improvements in said patent described were not an invention or discovery when produced by said David F. Shope and that they were not novel or new at that time and that in the state of the art or subject then existing it required not invention but only mechanical skill to produce said alleged improvements, and the same when produced by the said David F. Shope were not patentable, and were devoid of patentable novelty.

XX.

And defendants further answering, deny that David F. [26] Shope was the true, original or first inventor or discoverer of the alleged improvements in processes of waterproofing and ornamenting objects or objects such as cement blocks, covered by said patent No. 1,270,450; and the defendants aver that said methods, processes, and alleged improvements in said patent described were not an invention or discovery when produced by said David F. Shope and that they were not novel or new at that time and that in the state of the art or subject then existing it required not invention, *by* only mechanical skill to produce said alleged improvements, and the same when produced by the said David F. Shope were not patentable and were devoid of patentable novelty.

XXI.

And defendants further answering deny that

David F. Shope was the true, original or first inventor, or discoverer of the alleged improvements in brick making machines, covered by said patent No. 1,306,977; and the defendants aver that said device and alleged improvements in said patent described were not an invention or discovery when produced by said David F. Shope and that they were not novel at that time and that in the state of the art or subject then existing it required not invention but only mechanical skill to produce the same, and that the same when produced by said David F. Shope were not patentable and were void of patentable novelty.

That said alleged improvements in said patent No. 1,306,977 concerns an art or subject which was highly developed before said David F. Shope entered the field thereof with his alleged improvement, as shown by various patents of the United States duly published; that defendants are informed and believe and therefore aver that among said patents issued prior to the issuance of patent No. 1,306,977 were patents issued on January 24, 1905, February 14, 1905, November 7, 1905, and January 29, 1907; that information [27] concerning said previous patents has not come to defendants in time to set forth the details thereof in this answer, but the defendants are causing due search to be made and will disclose the same by amendment to this answer, or otherwise, as the Court may determine, upon having ascertained the same. Therefore, if the alleged improvements of said David F. Shope did constitute any invention

it was of a very narrow, specific and limited character, and must be construed accordingly in order not to encroach upon the rights which were vested in the general public prior to and at the time said David F. Shope entered the field of said art or subject.

WHEREFORE, the defendants pray that the bill of complaint herein be dismissed, and that they recover from complainant their costs and disbursements.

ROY WARD,
OTTO PETERSON,
Defendants.

COLLIER, COLLIER & BERNARD,
E. J. BERNARD,
Solicitors for Defendants.

Filed August 27, 1923. G. H. Marsh, Clerk. [28]

AND AFTERWARDS, to wit, on the 5th day of December, 1923, there was duly filed in said court an amendment to answer, in words and figures as follows, to wit: [29]

In the District Court of the United States for the District of Oregon.

IN EQUITY—E.—8661.

SHOPE BRICK COMPANY, a Corporation,
Complainant,

vs.

ROY WARD and OTTO PETERSON, Individually, and ROY WARD and OTTO PETERSON, Copartners, Doing Business Under the Firm Name and Style of WARD & PETERSON, Copartners,
Defendants.

AMENDMENT OF ANSWER.

Now come the defendants, Roy Ward and Otto Peterson, individually, and as copartners, doing business under the firm name and style of Ward and Peterson, and, by leave of the Court first had and obtained, amend their joint and several answer by striking out the last paragraph on page 13 of said answer after sentence ending line 11 on said page, and adding the following matter to wit:

XXII.

Defendants are informed and believe and therefore allege that the said David F. Shope was not the original or first inventor or discoverer of the invention purporting to be covered by the said letters patent, or of any material or substantial parts thereof, and that the same, or material or substantial parts thereof had been described and

illustrated in printed publications and patents prior to the date of the supposed invention of the said David F. Shope, and more than two years prior to his application for letters patent.

Defendants specify instances of such prior publication as follows, to wit: [30]

PUBLICATIONS ANTICIPATORY OF AFORESAID PATENT IN SUIT, NAMELY, NUMBERED 985,709, ISSUED FEBRUARY 28, 1911, TO DAVID F. SHOPE.

UNITED STATES LETTERS PATENT.

No. 115,475 issued May 30, 1871, to William Wheeler Hubbell.

No. 461,890 issued October 27, 1891, to George Richardson.

No. 518,239 issued April 17, 1894, to Edward Goode.

No. 527,416 issued October 16, 1894, to Antonio Federici.

No. 531,842 issued January 1, 1895, to William J. Haddock.

No. 587,484 issued August 3, 1897, to Johann Jungbluth.

No. 624,563 issued May 9, 1899, to Charles W. Stevens.

No. 692,644 issued February 4, 1902, to Frederic M. Emerson.

No. 703,644 issued July 1, 1902, to Edward Davies.

No. 723,281 issued March 24, 1903, to William E. Jaques.

No. 748,611 issued January 5, 1904, to William E. Jaques.

No. 751,089 issued February 2, 1904, to Frederick A. Malette.

No. 777,073 issued December 13, 1904, to Earl A. Brownson.

No. 814,358 issued March 6, 1906, to James J. Cox.

No. 818,286 issued April 17, 1906, to William Porten.

No. 829,249 issued August 21, 1906, to George H. Bartlett.

No. 833,952 issued October 23, 1906, to George Brown.

No. 850,670 issued April 16, 1907, to Timothy W. McClenahan.

No. 886,124 issued April 28, 1908, to John C. Henderson.

No. 958,194 issued May 17, 1910, to Augustus O. Thomas.

BRITISH LETTERS PATENT.

No. 2242, issued to Edward Butler, June 5, 1878.

No. 6952, issued to —— Kellner, May 6, 1890.

PUBLICATIONS ANTICIPATORY OF AFORESAID PATENT IN SUIT, NAMELY, NUMBER 1,270,450, ISSUED JUNE 25, 1918, TO DAVID F. SHOPE.

UNITED STATES LETTERS PATENT.

No. 115,475, issued May 30, 1871, to William Wheeler Hubbell.

No. 703,644, issued July 1, 1902, to Edward Davies.

No. 818,286, issued April 17, 1906, to William Porten.

No. 833,952, issued October 23, 1906, to George Brown.

No. 954,694, issued April 12, 1910, to Henry Desborough Phillips.

No. 985,709, issued February 28, 1911, to David F. Shope.

No. 1,160,708, issued November 16, 1915, to Gaulosher and Stacy.

PUBLICATIONS ANTICIPATORY OF AFORESAID PATENT IN SUIT, NAMELY, NUMBER 1,306,977, ISSUED JUNE 17, 1919, TO DAVID F. SHOPE.

UNITED STATES LETTERS PATENT.

All those cited by the Patent Office as set forth in the file wrapper and contents of the said patent, and particularly, No. 804,169, issued November 7, 1905, to William Porten, and other prior patents and publications which these defendants crave leave to produce at any hearing of this case, upon proper notice and supplemental pleadings, as soon as they are more fully [31] informed in the premises.

XXIII.

Defendants allege that the letters patent sued upon are, in all respects material to this cause, invalid for want of patentable invention.

WHEREFORE, these defendants, having fully answered to the said bill of complaint in so far as they are advised the same is material or necessary to be answered unto, deny that the said plaintiff is entitled to the relief or any part thereof in the said bill of complaint demanded, or any relief whatsoever, and pray to be hence dismissed with their reasonable charges in this behalf most wrong-

fully sustained, and such other relief as the Court may deem just and equitable.

ROY WARD,
OTTO PETERSON,
WARD & PETERSON,
Defendants.
By ATKINS & ATKINS,
Attorneys.

Filed December 5, 1923. G. H. Marsh, Clerk. [32]

AND AFTERWARDS, to wit, on the 13th day of May, 1924, there was duly filed in said court a stipulation relative to exhibits to be used at the trial, in words and figures as follows, to wit: [33]

In the District Court of the United States for the District of Oregon.

IN EQUITY.—E.—8661.

SHOPE BRICK COMPANY, a Corporation,
Complainant,

vs.

ROY WARD and OTTO PETERSON, Individually, and ROY WARD and OTTO PETERSON, Copartners, Doing Business Under the Firm Name and Style of WARD & PETERSON, Copartners,
Defendants.

STIPULATION RE EXHIBITS TO BE USED AT TRIAL.

The following stipulation is hereby entered into by and between counsel for the respective parties.

First. That at the trial of this cause printed, photostat, or lithographed copies of all reference patents, domestic or foreign, furnished by the United States Patent Office, and pleaded or introduced to illustrate the prior art, to define the scope of the patent, shall be accepted in evidence without certification, when offered by either party, with the same force and effect as if they had been certified, subject only to proof of inaccuracy, if any, and to their competency and relevancy.

Second. That the defendants shall be permitted for the purpose of demonstration only in this case, to make bricks or the like which they are enjoined by order of this Court from making, and that the making of such bricks or the like shall not be held to constitute a violation of the preliminary injunction heretofore issued by the Court in this case.

ROBERT R. RANKIN,
Attorney for Plaintiff.
ATKINS & ATKINS,
Attorneys for Defendants.

Approved this 13th day of May, 1924.

CHAS. E. WOLVERTON,
Judge.

Filed May 13, 1924. G. H. Marsh, Clerk. [34]

AND AFTERWARDS, to wit, on Tuesday, the 13th day of May, 1924, the same being the 62d judicial day of the regular March term of said court—Present, the Honorable CHARLES E. WOLVERTON, United States District Judge, presiding—the following proceedings were had in said cause, to wit: [35]

In the District Court of the United States for the District of Oregon.

No. E.—8661.

May 13, 1924.

SHOPE BRICK COMPANY

vs.

ROY WARD and OTTO PETERSON.

MINUTES OF COURT—MAY 13, 1924—MOTION FOR ORDER RE STIPULATION.

Now at this day comes the plaintiff by Mr. R. R. Rankin, of counsel, and submits to the Court a stipulation signed by attorneys for the respective parties hereto, and moves the Court for an order in accordance with said stipulation. Upon consideration whereof,

IT IS ORDERED that at the trial of this cause printed, photostat, or lithographed copies of all reference patents, domestic or foreign, furnished by the United States Patent Office, and pleaded or introduced to illustrate the prior art, to define the scope of the patent, shall be accepted in evi-

dence without certification, when offered by either party, with the same force and effect as if they had been certified, subject only to proof of inaccuracy, if any, and to their competency and relevancy; and that the defendants shall be permitted for the purpose of demonstration only in this case, to make bricks or the like which they are enjoined by the order of this Court from making, and that the making of such bricks or the like shall not be held to constitute a violation of the preliminary injunction heretofore issued by the Court in this case.

CHAS. E. WOLVERTON,
Judge.

Filed May 13, 1924. G. H. Marsh, Clerk. [35½]

AND AFTERWARDS, to wit, on the 9th day of June, 1924, there was duly filed in said court an opinion, in words and figures as follows, to wit: [36]

In the District Court of the United States for the District of Oregon.

No. E.—8661.

SHOPE BRICK COMPANY,
Complainant,

vs.

ROY WARD and OTTO PETERSON,
Defendants.

Portland, Oregon, June 9, 1924.

OPINION.

R. S. BEAN, District Judge (Oral).

This is a suit for infringement of patent issued to plaintiff's assignee in February, 1911. The patent covers a process for waterproofing cement brick or cement blocks, and consists of the covering of the face of the block with water, then applying pure cement and by agitating forcing the solution or mixture into the pores of the block, thus making it waterproof.

There are two questions raised by the defendant: First, that they have not infringed this patent, and second, that the plaintiff was not the original inventor of the patent process. Now, as far as the first question is concerned, there is, in my judgment, no room for controversy about the infringement. The process used by the defendant was substantially the same as that covered by the patent, so if the patent is valid there is in my judgment no question about the infringement.

Now, the patent is the first one issued covering this method or this process. There were prior patents issued for covering cement blocks with cement, but it was either under pressure or by simple dipping, but the process described in plaintiff's patent is not anywhere disclosed directly by the prior art, and the rule is that the granting of a patent is *prima facie* evidence that the patentee is the first inventor, and of its novelty, and the burden of proof is on one who assails the patent for want of novelty, and many authorities have stated that every reasonable doubt should be resolved against him. Now, in view

of that rule as I interpret this record, it has not been shown clearly that the patentee was not the original and first inventor of this process, and for that reason it seems to me that the plaintiff is entitled to the relief demanded in his prayer.

Filed June 9, 1924. G. H. Marsh, Clerk. [36½]

AND AFTERWARDS, to wit, on Monday, the 9th day of June, 1924, the same being the 84th judicial day of the regular March term of said Court—Present, the Honorable ROBERT S. BEAN, United States District Judge, presiding—the following proceedings were had in said cause, to wit: [37]

In the District Court of the United States for the District of Oregon.

No. E.—8661.

SHOPE BRICK COMPANY, a Corporation,
Complainant,

vs.

ROY WARD and OTTO PETERSON, Individually, and ROY WARD and OTTO PETERSON, Copartners, Doing Business Under the Firm Name of WARD & PETERSON, Copartners,
Defendants.

MINUTES OF COURT—JUNE 9, 1924—DECREE.

At the March Term of the District Court of the United States for the District of Oregon, held at the United States Courtroom, in the City of Portland, State of Oregon, on the 27th day of May, 1924—Present: Honorable ROBERT S. BEAN, District Judge.

This cause came on to be heard at the March term of the said court on the 27th day of May, 1924, and was continued to and concluded upon the 28th day of May, 1924, and thereafter continued until the present date under advisement, and thereupon, under consideration thereof, it was

ORDERED, ADJUDGED AND DECREED as follows:

That letters patent No. 985,709, entitled, method of waterproofing cement blocks, granted and issued on the 28th day of February, 1911, to David F. Shope, and referred to in the bill of complaint herein, is good and valid as respects all of the specifications thereof.

That said David F. Shope was the first, true, sole and original inventor and discoverer of each and all of the claims mentioned and described in the said patent No. 985,709.

That the said inventions as described in said claims were new and useful inventions that were neither known nor used by others in this or any foreign country before the invention and discovery thereof by the said David F. Shope, and which were never patented or described in this or any foreign country before the invention and discovery thereof by

the said David F. Shope, or more than two years before the application for the United States [38] letters patent therefor, and at the time of the application for United States letters patent therefor, the same had not been in public use or on sale.

That before the infringements complained of in the bill of complaint, the Shope Brick Company, a corporation organized under and existing by virtue of the laws of the State of Oregon, had become and was and still is the sole owner of said Patent No. 985,709, as alleged in the bill of complaint, by assignment duly recorded in the Patent Office of the United States; that all of the inventions and improvements mentioned and described in the patent No. 985,709 have been and are now used by the complainant and also by the defendants in the infringement complained of in said bill of complaint.

That said defendants Roy Ward and Otto Peterson, individually, and Roy Ward and Otto Peterson, copartners, doing business under the firm name and style of Ward & Peterson, copartners, infringed upon said letters patent No. 985,709, and upon the exclusive rights of the complainant under the same; that is to say, by making, using and selling blocks, bricks and artificial structures embodying the inventions and improvements patented as aforesaid and as charged in the bill of complaint.

And it is further ordered, adjudged and decreed that complainant does recover of the defendants the profits, gains and advantages which the said defendants, or either of them, have received or made, or which have arisen or accrued to them, or either of them, in their individual or partnership capacity by the manufacture, use or sale of the said bricks

or blocks or artificial structures, processed in the manner described in and in violation of the said letters patent, since the 1st day of January, 1923; and that the complainant does recover the damages resulting from said infringement. [39]

And it is further ordered, adjudged and decreed that complainant does recover of the defendants its costs, charges and disbursements in this suit to be taxed.

And it is further ordered, adjudged and decreed that it be referred to Robert Maguire as Master in Chancery, his experience in such matters being found by the Court sufficient reason for such appointment, to ascertain, take and state, and report to the Court, an account of the number of bricks, blocks and artificial structures embodying the said inventions and improvements and each thereof, described and secured in said letters patent, made, used, or sold by said defendants; and also the gains, profits and advantages which the said defendants have received or which have arisen or accrued to them, or either of them, since the 1st day of January, 1923, from infringing the said exclusive rights of said complainant by the manufacture, use or sale of the said inventions and improvements in the said letters patent, and the damages which the complainant has suffered by said infringements.

And it is further ordered, adjudged and decreed that the complainant, on such accounting, have the right to cause the examination of said defendants, or either of them, *ore tenus,* or otherwise; and also the production of the books, vouchers or documents of the said defendants; and that they and each of

them attend for such purpose before the said Master in Chancery as the said Master shall direct.

And it is further ordered, adjudged and decreed that a perpetual injunction be issued in this suit against the said defendants and each of them, restraining them, their agents, clerks, servants, or all claiming by, through or under them, from making or selling, or in any way using or disposing of bricks, blocks, or artificial structures, embracing the inventions or improvements described in said letters patent, pursuant to the prayer of the [40] said bill of complaint.

And jurisdiction is hereby retained for the purpose of making and enforcing any additional order or orders as may be deemed necessary relative to this suit, and to enforce compliance to this decree.

Dated at Portland, Oregon, this 9th day of June, 1924.

R. S. BEAN,
United States District Judge.

Filed June 9, 1924. G. H. Marsh, Clerk. [41]

AND AFTERWARDS, to wit, on the 14th day of June, 1924, there was duly filed in said court a petition for appeal, in words and figures as follows, to wit: [42]

In the District Court of the United States for the District of Oregon.

No. E.—8661.

SHOPE BRICK COMPANY, a Corporation,
Complainant,

vs.

ROY WARD and OTTO PETERSON, Individually, and ROY WARD and OTTO PETERSON, Copartners, Doing Business Under the Firm Name of WARD & PETERSON, Copartners,
Defendants.

PETITION ON APPEAL.

The above-named defendants, Roy Ward and Otto Peterson, doing business under the firm name of Ward and Peterson, considering themselves aggrieved by the decree entered in the above-entitled cause under date of June 9, 1924, whereby this Court did adjudge and decree that letters patent of the United States, No. 985,709 granted to David F. Shope, February 28, 1911, for improvements in methods of waterproofing cement blocks and assigned to the plaintiff herein, are good and valid in law; that the defendants have infringed the same; and that the plaintiff shall have the relief demanded in its prayer with costs.

Therefore, the defendants do hereby appeal from said decree and each and every part thereof, for the reasons set forth in the assignment of errors filed herewith, to the United States Circuit Court of

Appeals for the Ninth Circuit, and pray that this appeal may be allowed and that a transcript of the record and proceedings, upon which said decree was made, duly authenticated, may be sent to said Court of Appeals, together with the exhibits in this case.

Dated June 14, 1924.

ATKINS & ATKINS,
JOSEPH L. ATKINS,
LEICESTER B. ATKINS,
Attorneys for Defendants.

Filed June 14, 1924. G. H. Marsh, Clerk. [43]

AND AFTERWARDS, to wit, on the 14th day of June, 1924, there was duly filed in said court an assignment of errors, in words and figures as follows, to wit: [44]

In the District Court of the United States for the District of Oregon.

No. E.—8661.

SHOPE BRICK COMPANY, a Corporation,
Complainant,

vs.

ROY WARD and OTTO PETERSON, Individually, and ROY WARD and OTTO PETERSON, Copartners, Doing Business Under the Firm Name of WARD & PETERSON, Copartners,
Defendants.

ASSIGNMENT OF ERRORS.

Now, this 14th day of June, 1924, comes the above-named defendants by their solicitors and counsel, Atkins and Atkins, and say that the decree entered in the above-entitled cause on the 9th day of June, 1924, is erroneous and unjust to defendants:

I.

Because the District Court adjudged and decreed that the improvements described and claimed in the letters patent of the United States No. 985,709, granted to David F. Shope, February 28, 1911, for improvements in methods of waterproofing cement blocks, assigned to plaintiff and sued on herein, did involve invention and that said patent is valid.

II.

Because the District Court failed and refused to adjudge and decree that the said David F. Shope did not invent any new, useful, and patentable improvements in methods of waterproofing cement blocks as described and claimed in said letters patent.

III.

Because the District Court erred in not adjudging that said letters patent are void.

IV.

Because the District Court erred in failing and refusing to adjudge and decree that the invention as described and claimed in said letters patent is inoperative. [45]

V.

Because the District Court erred in failing and refusing to adjudge and decree that the very method employed by the defendants and complained of in the bill herein as constituting infringement of the

said letters patent sued on, was described in a claim which was presented by the patentee while his application for said letters patent was pending in the Patent Office and which was canceled by him after the Patent Office rejected said claim.

VI.

Because the District Court erred in adjudging and decreeing that said letters patent are valid, that the defendants infringed the same, and that the plaintiff as the assignee of said letters patent is entitled to relief from such infringement as prayed for in the bill herein.

VII.

Because the said decree of the District Court is in prejudice of the substantial rights and equities of the defendants in the premises.

Dated June 14, 1924.

ATKINS & ATKINS,
JOSEPH L. ATKINS,
LEICESTER B. ATKINS,
Attorneys and Counsel for Defendants.

Filed June 14, 1924. G. H. Marsh, Clerk. [46]

AND AFTERWARDS, to wit, on Tuesday, the 14th day of June, 1924, the same being the 91st judicial day of the regular March term of said Court—Present, the Honorable ROBERT S. BEAN, United States District Judge, presiding—the following proceedings were had in said cause, to wit: [47]

In the District Court of the United States for the District of Oregon.

No. E.—8661.

SHOPE BRICK COMPANY, a Corporation,
Complainant,

vs.

ROY WARD and OTTO PETERSON, Individually, and ROY WARD and OTTO PETERSON, Copartners, Doing Business Under the Firm Name of WARD & PETERSON, Copartners,
Defendants.

MINUTES OF COURT—JUNE 14, 1924—ORDER ALLOWING APPEAL.

On motion of counsel for the above-named defendants, it is

ORDERED that an appeal be and hereby is allowed to the United States Circuit Court of Appeals for the Ninth Circuit, from the final decree entered in the above-entitled cause on or about the 9th day of June, 1924, sustaining the bill of complaint and it is ordered that a transcript of the record and proceedings upon which said decree was made duly authenticated and the physical exhibits submitted in said cause be sent to said Circuit Court of Appeals.

IT IS FURTHER ORDERED that the defendant file a bond to be approved by this Court in the sum of Five Hundred Dollars, to answer all

costs on the appeal which may be adjudged or awarded against defendants if they shall fail to prosecute their appeal to effect and shall fail to make good their appeal.

Dated June 14, 1924.

R. S. BEAN,
Judge.

Filed June 14, 1924. G. H. Marsh, Clerk. [48]

AND AFTERWARDS, to wit, on the 16th day of June, 1924, there was duly filed in said court a bond on appeal, in words and figures as follows, to wit: [49]

HARTFORD ACCIDENT AND INDEMNITY COMPANY,

HARTFORD, CONNECTICUT.

In the District Court of the United States for the District of Oregon.

SHOPE BRICK COMPANY, a Corporation,
Plaintiff,

vs.

ROY WARD and OTTO PETERSON, Individually, and ROY WARD and OTTO PETERSON, Copartners, Doing Business Under the Firm Name of WARD & PETERSON, Copartners,
Defendants.

UNDERTAKING ON APPEAL.

WHEREAS, the defendants in the above-entitled action appeal to the United States Circuit Court of Appeals for the Ninth Circuit from a decree made and entered against them in the said cause in the said District Court of the United States for the District of Oregon against the defendants, Roy Ward and Otto Peterson, doing business as copartners under the firm name of Ward & Peterson, on the 9th day of June, 1924.

NOW, therefore, in consideration of the premises, and of such appeal, the undersigned, Hartford Accident and Indemnity Company, a corporation organized and existing under the laws of the State of Connecticut, and authorized under the laws of the State of Oregon to become surety on bonds, in the State of Oregon, does hereby jointly and severally undertake and promise, on the part of the appellant, that the said appellant will pay all costs on the appeal which may be adjudged or awarded against defendants if they shall fail to prosecute their appeal to effect and shall fail to make good their appeal.

HARTFORD ACCIDENT AND INDEMNITY COMPANY.
By DOW V. WALKER, (Seal)
Attorney-in-fact.

Countersigned:
WALKER, JEWETT & BARTON.
By DOW V. WALKER,
Agents.

Approved June 17, 1924.

R. S. BEAN,
Judge.

Filed June 16, 1924. R. H. Marsh, Clerk. [50]

AND AFTERWARDS, to wit, on the 16th day of June, 1924, there was duly filed in said court a stipulation for transcript, in words and figures as follows, to wit: [51]

In the District Court of the United States for the District of Oregon.

No. E.—8661.

SHOPE BRICK COMPANY, a Corporation,
Complainant,

vs.

ROY WARD and OTTO PETERSON, Individually, and ROY WARD and OTTO PETERSON, Copartners, Doing Business Under the Firm Name of WARD & PETERSON, Copartners,
Defendants.

STIPULATION RE TRANSCRIPT OF RECORD.

G. H. Marsh, Esq., Clerk of the Above-named Court:

It is hereby stipulated that the transcript of record shall contain the following and that the

praecipe heretofore filed may be disregarded and omitted.

In making up the transcript of appeal now pending in this cause to the United States Circuit Court of Appeals for the Ninth Circuit, please incorporate the following portions of the record:

1. The bill of complaint, omitting verification.
2. The amended answer, omitting verification.
3. Stipulation dated May 13, 1924, filed same date.
4. Copy of Shope Patent No. 985,709, Plaintiff's Exhibit 1.
5. Certified copy of the file-wrapper and contents of Shope Patent No. 985,709, Defendants' Exhibit "B."
6. The evidence taken in the trial court as set forth in the transcript of record in said court.
7. The opinion of the trial Court.
8. The interlocutory decree entered June 9, 1924.
9. The petition for, and order allowing appeal.
10. The bond on appeal.
11. The assignment of errors.
12. The citation on appeal.
13. Copies of drawings and specifications of patents numbered 518,239, 527,416, 531,842, 703,644, 958,194, 751,089 (constituting, respectively, Defendants' Exhibits "F," "G," "H," "L," "V," and "W"); and 624,563, constituting Defendants' Exhibit "A"; also the physical exhibits identified as Plaintiff's Exhibits 11–A, 11–B, 11–C, 11–D, and 11–E; also, Defendants' Ex-

hibits "X" and "Y"; also photographs, Plaintiff's Exhibits 3, 4, 5, 6, 7, 8, 9, and 10. [52]

And an order may be entered by the Court directing that all the original exhibits used on the trial of this cause be sent to the said Circuit Court of Appeals for its use.

Dated, June 14, 1924,

ROBERT V. RANKIN,
Attorney for Plaintiff.
JOSEPH L. ATKINS,
Of Attorneys for Defendants.

Filed June 16, 1924. G. H. Marsh, Clerk. [53]

AND AFTERWARDS, to wit, on the 17th day of June, 1924, there was duly filed in said court a statement of the evidence and exhibits therewith, in words and figures as follows, to wit: [54]

STATEMENT OF EVIDENCE.

Filed June 17, 1924. (Sgd.) G. H. Marsh, Clerk. [55]

In the District Court of the United States for the District of Oregon.

SHOPE BRICK COMPANY, a Corporation,
Complainant,

vs.

ROY WARD and OTTO PETERSON,
Defendants.

[56]

In the District Court of the United States for the District of Oregon.

No. E.—8661.

SHOPE BRICK COMPANY, a Corporation,
Complainant,

vs.

ROY WARD and OTTO PETERSON, Individually and ROY WARD and OTTO PETERSON, Copartners, Doing Business Under the Firm Name and Style of WARD & PETERSON, Copartners,
Defendants.

BE IT REMEMBERED that this suit came on for trial before the Honorable Robert S. Bean, Judge of the above-entitled court on Tuesday, the 27th day of May, 1924, at the hour of 9:00 A. M.

of said day, complainant appeared by his attorney, Robert R. Rankin, and defendants appearing by their attorneys, Messrs. Atkins & Atkins.

Whereupon the following proceedings were had: [57]

TESTIMONY OF DAVID F. SHOPE, FOR PLAINTIFF.

DAVID F. SHOPE, called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows.

Direct Examination.

(Questions by Mr. RANKIN.)

Your name is David F. Shope, and you reside at Portland, Oregon?

A. It is; I do.

Q. What is your occupation, Mr. Shope?

A. Brick manufacturer.

Mr. RANKIN.—I may say that at this time it has been stipulated between Mr. Atkins and myself that patents may be introduced without the originals, as we both have copies of the patents, and I offer the patent in suit.

Marked Plaintiff's Exhibit 1 and read.

Q. Mr. Shope, are you the inventor who is mentioned in that document or letters patent?

A. I am.

Q. Do you own that patent? A. I do not.

Q. Who is the owner?

A. The Shope Brick Company.

Q. Have you assigned it to them? A. I have.

Q. What is the Shope Brick Company?

(Testimony of David F. Shope.)

A. An Oregon corporation.

Mr. RANKIN.—Counsel does me the courtesy to stipulate that in order that we may not disfigure this book, the minute-book of the corporation, that the articles of incorporation of the Shope National Concrete Machinery were filed in Oregon on the 13th day of April, 1911, and that subsequently on the 9th of March, 1917, the name of the corporation was changed to the Shope Brick Company, and let the record so show. Counsel [58—1] stipulates that in the record we may file copies.

Q. The principal place of business of the Shope Brick Company is where?

A. East 8th and Division Streets, Portland, Oregon.

Q. How many years have you been engaged in the occupation that you mentioned, brick making?

A. In the brick making, between 30 and 40 years.

Q. How long have you followed the trade of cement brick making?

A. In its operation a great part of that time. Specializing in cement products about 20 years ago.

Q. Do you still keep up with the brick end of the business?

A. I do so by attending conventions, keeping all the magazines and literature bearing on the brick business constantly at hand.

Q. Have you an investigating sort of mind?

A. I believe it would so be considered.

Q. Are you a scientist? A. Scientist, no.

(Testimony of David F. Shope.)

Q. When did you begin your experimenting, Mr. Shope?

A. In this line, as I said, about 20 years ago.

Q. I couldn't quite hear.

A. About 20 years ago.

Q. What started you?

A. Being previously a manufacturer of clay products and carrying on general contracting, I conceived the idea as cement became available, that it was possible to make brick out of cement at points where clay was not available, and long distance shipments, so there was called in Chicago a concrete products convention some twenty years ago. I decided I would go down there and possibly pick me out a brick machine for the idea I had in mind, and observed that they were all semi-dry; that the product was [59—2] not meritorious.

Q. What sort of brick were upon the market when you began your investigation?

A. The line of what is known as semi-dry, common brick and blocks.

Q. At that time was there any attempt at waterproofing common brick that you had mentioned?

A. There had just begun possibly by chemists the integral waterproofing compound to overcome this objection.

Q. Was there any such product on the market?

A. I think there was at that time a very few in comparison with what there has been developed since.

Q. You said you knew the condition at that time

(Testimony of David F. Shope.)

of the market for common cement brick. What were their defects, if any?

A. They were not substantial structures, being porous and weak in comparison with what a good concrete product should be.

Q. Did you, in the process that you invented, overcome these defects? A. I did.

Q. How did you overcome them?

A. By incorporating more water in their fabrication.

Q. Any other?

A. And by perfecting a process of waterproofing the face as well as ornamenting the same.

Q. Did the trade take kindly to your proposition?

A. Not at first sight, except in limited cases.

Q. You had a great struggle? A. I did.

Q. Did this take much of your time?

A. When I once decided to make this worth while, I made it my serious and constant attention.

Q. What proportion of your life effort is represented in it? [60—3] A. Some 20 years.

Q. And have those 20 years been primarily devoted to that service, or have you had other collateral matters? A. Primarily to that service.

Q. Is your business, as it now exists, built upon this patent? A. Yes, it is, largely.

Q. What is the extent of your business?

A. The extent of my licensees since the issue of this patent, some four or five hundred thousand dollars.

Q. Are you doing business outside of this state?

(Testimony of David F. Shope.)

A. In some twenty odd states of the union, I have licensees.

Q. Is your service confined to the United States?

A. No, I have a number of plants in Canada, also patents there.

Q. What is the worth of your—you speak of licensees. What is your method of licensing them, briefly?

A. I conceived the passing on of the monopoly intended by the Patent Office to eliminate duplication of investment and ruinous competition. First we have to meet the trade with competition. We have got to do that with an equal or superior product at advantageous points, and my mode of installing plants is to prescribe the territory in which the brick is manufactured and sold, and in my duplicate license contract I agree at all times to defend the validity of my patents.

Q. As I understand you then, you license certain individuals in prescribed territory to use your patent rights? A. I do.

Q. Do you get reports from those localities in which plants are operating under your license?

A. Frequently and constantly.

Q. If you know, you can state to the Court, what is the product of these plants in the United States, the output of them? [61—4]

A. From two to three hundred thousand face brick per day.

Q. How long did this business operate without interference? A. Until the last three years.

(Testimony of David F. Shope.)

Q. In such opposition as has appeared, what have you done?

A. I have proceeded at all times with due caution to eliminate them. They have, until the last year, quit without contest. In the placing of a great many of these licenses, after getting the matter before them, they have asked for time, sometimes a month or two, to investigate my patents, after which contracts would be concluded. No one worth while in a material way has attempted to infringe the patent.

Q. Have you at the present time any cases pending?

A. One in Pennsylvania and one in Washington, in addition to this one.

Q. Have you had interference in Portland, Oregon?

A. Yes, some three or four years ago, perhaps five, a bricklayer by the name of Lescher had been applying my brick and using them in his work.

Q. That amounted to nothing, did it, Mr. Shope?

A. No. As soon as I brought the fact to his attention, he stopped.

Q. Recently have you had any interference?

A. The firm in question here, Ward & Peterson, some year or so ago.

Q. Have you licensed them? A. I have not.

Q. Have you allowed them to sell your brick, the thing manufactured, which is a product under your invention, have you authorized them to sell it?

A. I have not.

(Testimony of David F. Shope.)

Q. Have you authorized them to manufacture it, or to use it? A. I have not.

Q. When did you first become aware of their activity? [62—5]

A. Something like a year ago.

Q. What did you do?

A. I had contemplated after my city salesmen called it to my attention, to go out and talk it over with them. About that time I was attacked with a case of appendicitis, and was some two months in the hospital. As soon as I was able to get up, I remember I asked you to go with me, and our chauffeur drove us, my chauffeur drove us out to the plant.

Q. Where was that plant located?

A. At Sellwood, somewhere on 9th Street, I believe it is.

Q. Portland, Oregon?

A. Portland, Oregon. I went in there and explained the situation to Ward & Peterson while I was there. I believe one of the first leading remarks was that they had been doing this 20 years. I said that is very strange I have never seen or heard of them; have been trying to keep pretty well posted. I believe I offered to make them a present of five hundred or a thousand dollars if they would produce a brick made by them or anyone else 20 years ago. About that time I was ordered out of the plant very distinctly. He says, "If you want to start anything, start it." I says, "All right, we will do that at once." And left their plant.

(Testimony of David F. Shope.)

Q. State whether or not in their presence you instructed me to institute proceedings?

A. I did.

Q. The interview as a whole was not a pleasant one?

A. Not a pleasant one, no, unfortunately.

Q. Did you ever again visit their plant?

A. Not until one day last week.

Mr. RANKIN.—And that was, I might state to the Court at [63—6] this point by Messrs. Atkins & Atkins, attorneys for the defendants and myself under stipulation approved by the Court for the purpose of seeing the processes used there, and also to see the Shope plant, and see the processes used there.

Q. It was this occasion you mentioned when you visited there? A. Yes, it was.

Q. What did you observe, please?

A. I observed—I was going to take it up just a little further. On the first interview and inspection of their plant, I observed their stock pile. I seen quite a quantity of brick that would hardly be distinguished from the ones made at my plant. In the last visit they showed us the operation claiming to be the one they were using in producing a similar one to mine.

Mr. RANKIN.—At this point, it has been stipulated between counsel and myself that we have had certain pictures taken here and perhaps it will give a better idea than going into any detailed description.

(Testimony of David F. Shope.)

Q. Just state briefly what this is, and I will pass it over so the Court can see.

A. That is the building of the Ward & Peterson Company.

Offered in evidence and marked Plaintiff's Exhibit 2.

Q. And this.

A. This is a Shope brick machine operated in the Shope brick factory.

Offered in evidence and marked Plaintiff's Exhibit 3.

Q. This is one of your workmen? A. Yes.

Q. And what is this, please?

A. Another Shope brick machine, a different position [64—7] of the same thing.

Offered in evidence and marked Plaintiff's Exhibit 4.

Q. What is this, please?

A. This is one of the machines being operated by Ward & Peterson at their plant.

Offered in evidence and marked Plaintiff's Exhibit 5.

Q. This one, please.

A. This is another one of the machines operated at the Ward & Peterson plant, which they stated, I think, came from Montgomery Ward or Sears-Roebuck.

Offered in evidence and marked Plaintiff's Exhibit 6.

Q. This is a picture of Mr. Ward, the defendant?

A. Yes.

(Testimony of David F. Shope.)

Q. And this, please?

A. This is another view of the finished product from the last-named machine.

Q. Where located?

A. At Ward & Peterson's plant, Portland, Oregon.

Offered in evidence and marked Plaintiff's Exhibit 7.

Q. Did you see the brick manufactured upon this machine? A. I saw this brick manufactured.

Q. And entirely manufactured from sand into the product? A. As it then stood.

Q. And this, please.

A. This is another Shope brick machine being operated in the Shope brick plant at Portland, Oregon, different position of the work. [65—8]

Offered in evidence and marked Plaintiff's Exhibit 8.

Q. And this one, please.

A. This is another one of the Shope brick machines in the Shope brick factory.

Q. You will have to talk louder.

Q. This is another one of the Shope brick machines being operated in the Shope brick factory.

Offered in evidence and marked Plaintiff's Exhibit 9.

Q. I think this is largely a duplication, but as long as it is taken I think we will submit it.

A. I think this is the some workman and the same machine with the knives turned rearward to relieve the brick.

(Testimony of David F. Shope.)

Offered in evidence and marked Plaintiff's Exhibit 10.

Q. Now, Mr. Shope, with these exhibits that relate to your own plant, will you explain to the Court, please, what the operation is in general there, in the manufacture of brick?

Mr. ATKINS.—Will you frame your question so it can be dealt with separately.

A. Mention the exhibit as you describe it and the exhibit number has been marked on the back by the reporter. Just describe the method of your manufacture.

A. Referring to Exhibit No. 4, the cement, sand and gravel having went through the mixture placed by the operator at the machine has been shoveled into the machine, and with this tamp has tamped the brick sufficient. The next step is the operation of waterproofing the face by puddling the water, coloring matter and cement by agitation over the face of the product. [66—9] Exhibit No. 3 is exposition of the agitation of the surface of the product, one of the agitations. Exhibit 8, the agitation of the end of the brick has been carried on the same as the face, the guard plate being in position to be removed for completing the operation. Exhibit No. 10, this is another workman. The face having been completed, the workman draws the knives rearward, leaving the finished product. That shows the brick finally released. No. 9 is the workman showing the tamping or the compacting of the material ready for facing.

(Testimony of David F. Shope.)

Q. Now, were you present at the time these pictures were taken relating to defendants?

A. I was.

Q. Explain the two that you have there. Take the first exhibit, No. 5.

A. Referring to Exhibit 5, shows the brick manufactured by Ward & Peterson and released, left on the pallet the same as produced in our plant.

Q. Take Exhibit No. 6, what is that?

A. That is the machine that was used to make the header, the head on, or put the end on the brick; instead of guide plate as shown in previous exhibit, the Shope Brick Company, they hold a trowel in position, agitating and troweling the face on the end.

Q. Exhibit No. 7.

A. Is the finished product in attempted release; something got wrong with this machine, it would not go back, but that is where we left it.

Q. Was what you saw the defendants doing there substantially the same thing what you had described in your invention? A. It was. [67—10]

Cross-examination.

(Questions by Mr. ATKINS.)

You have testified, Mr. Shope, that you have been engaged in the brick-making business for 30 or 40 years? A. I did.

Q. Please explain a little more fully in what way you were engaged in that business.

A. Some thirty-odd years ago I was awarded the contract for building a bank building in my general

(Testimony of David F. Shope.)

contracting activities in Custer, South Dakota. Up to that time I had manufactured no brick, but there was a clay brick-yard there that had been operated, and the operator wanted to leave town, and made me a proposition to sell me this clay brick-yard. In order to secure the brick for this job, I decided to buy, and did buy this brick-yard. I operated it for some six or seven years, having the only clay brick-yard within a hundred miles of that place, shipping from there to Hot Springs, South Dakota, and other points. The last kiln of brick I burned in that yard had a million clay brick in it.

Q. You say that you bought that clay brick-yard thirty years ago, about?

A. Over. Thirty-seven or thirty-eight years ago, I guess.

Q. I didn't so understand. A. Yes.

Q. When did you begin to be interested in concrete work or cement work of any sort?

A. Some twenty years ago.

Q. Did you know anything about cement work, in a practical way before twenty years ago?

A. I did, such as putting in sidewalks, foundations, to a limited extent, and whatever was being done in cement in the art [68—11] at that time, I was Johnny on the spot.

Q. How far back does that acquaintance run, acquaintance with cement work?

A. When it became available, about twenty odd years ago.

Q. I want a statement of time?

(Testimony of David F. Shope.)

A. Twenty-odd years ago.

Q. Then your acquaintance with cement work, using that term in a general sense, began practically about twenty years ago?

A. I don't remember just the time, but when it was being introduced in the first stages in carrying on general contracting, naturally I was familiar with its operation and placement.

Q. Now, when you say that you were engaged in that work, you mean to say you were an artisan in the handling of cement?

A. I was a brick workman.

Q. You were with your own hands working with it? A. Many times.

Q. And prior to a period beginning about twenty years ago you had no practical experience in cement work?

A. I had all the practice the art developed in the last thirty-seven or eight years in the way of ordinary construction.

Q. You mean to say that you did that work more than twenty years ago?

A. I cannot recall to mind my first job, no.

Q. I understand that you have stated that your practical work in cement began about twenty years ago. A. Only specializing in it.

Q. You didn't so say. Now, will you please explain what you mean by cement work?

A. Sidewalks and the like.

Q. Do you know when you first laid a sidewalk?

A. I feel quite sure it was longer than twenty years ago. [69—12]

(Testimony of David F. Shope.)

Q. You swear that it was?

A. I think I am perfectly within the time limit.

Q. Do you swear positively that you did sidewalk work more than twenty years ago?

A. I would have to have my wife here to tell me where we was, and what was going on about that time. I usually refer to her.

Q. You testified that you began investigation in certain cement work about twenty years ago.

Q. What investigation do you refer to?

A. By going to Chicago to review convention of concrete products, called for that purpose at the Coliseum at Chicago.

Q. Do you know when that convention was held?

A. Roughly, some twenty years ago.

Q. At that time, what was the state of the development of the art of making objects of cement composition, if you remember in a general way?

A. They were along the semi-dry line, exclusively.

Q. Did you see at that time any specimens of what is called cast stone?

A. I think I did; quite sure.

Q. What is the difference between semi-dry brick, we will say, and cast stone?

A. One can be removed from the machine at once, making it a commercial proposition on a large scale, while the other must remain in the machine until it is set hard enough to remove.

Q. Your answer is not responsive. What I want to know is what is the difference in the two materials in manufacturing.

(Testimony of David F. Shope.)

A. One is a much better product than the other.

Q. What is the difference, structurally, or considered according to the process of manufacture?

A. The cast stone is more dense and more crushing and tensile [70—13] strength.

Q. The cast stone is a better article, then, you would say, than the semi-dry brick? A. Yes.

Q. How is cast stone made?

A. By pouring it in liquid form into a mold, that is not liquid, but so it will run and nicely take the impression of the face of the plate that might be for its reproduction. Sometimes they are wooden molds, sometimes plaster molds, sometimes they are undercut, where it can't be pulled directly away in the glue mold.

Q. When you say liquid cement, what do you mean?

A. I mean cement, water and aggregate, mixed to the consistency of flowing.

Q. You can use cement and water without any aggregate other than the cement affords?

A. Neat cement without any aggregate.

Q. Were you familiar at that time, twenty years ago, with what is known as the Stevens cast stone?

A. I was not at that time familiar with any of them when I first began my investigations.

Q. Did you see the Stevens cast stone exhibit at that convention?

A. I do not call in mind whether I did or not.

Mr. ATKINS.—I offer a copy of the patent in evidence to save time.

(Testimony of David F. Shope.)

Mr. RANKIN.—This is going into the patent. We have an expert for that, and is going to take up a lot of time in this examination. I believe the question was improperly put to this witness, because in the direct examination he is not qualified on patents. We will take a great deal of time on that subject. [71—14]

COURT.—He is asking whether he knew the patent at that time.

Mr. ATKINS.—I am not going into the patent, but I want to find out what he knew about the art upon which his invention to be patentable must have been predicated.

A. I don't remember having seen it at all.

Mr. ATKINS.—I offer in evidence the patent first submitted to the witness, No. 624,563, issued May 9, 1899, to C. W. Stevens.

Marked Defendants' Exhibit "A."

Q. Referring again to this Defendants' Exhibit "A," which I hand you, please state when you first became acquainted with the existence of that patent? A. I do not call it in mind at all.

Q. Have you ever seen it before?

A. I have never seen that patent before, no.

Q. You knew that it was set up in the answer, didn't you, in this case?

A. I will have to refer that to my attorney, whether that particular patent has been set up.

A. Well, as far as you know.

Mr. RANKIN.—That is certainly improper, if the Court please. The pleadings certainly speak for themselves.

(Testimony of David F. Shope.)

Mr. ATKINS.—I am asking whether he knew, not whether in there.

Mr. RANKIN.—It is immaterial.

COURT.—If you don't know, say so.

A. No, I do not.

Q. There is no denial upon your part, I believe, that semi-dry bricks or blocks had been made more than twenty years ago. A. No. [72—15]

Q. Explain to the Court what you mean by semi-dry bricks or blocks?

A. Where the brick or block was molded so semi-dry that you could take it up by hand and press it in your hand and it didn't stick to it for the reason that at that time the brick and block was molded against steel-faced plates there in position. Then the mold was dry, drove the water from the pipe; would leave the product stand on the pallet, the form of the green block. Now, if we would attempt to make a sidewalk to-day the way they made blocks, they would be utter failures, for the reason the lack of moisture didn't make a perfectly homogenic aggregate and bind it thoroughly together. If you were going to build a building here, the inspector would not let us build a semi-dry foundation. It would have to be wet; block and brick at that time were all along the line of semi-dry, against a face plate or plunger; sometimes a plunger might go down. It is all in the line of semi-dry products.

Q. The body of brick which you make to-day is semi-dry brick, which was old twenty years ago?

(Testimony of David F. Shope.)

A. No, sir, my object in developing this machine and process was to have a mixture which excluded the sliding movement.

Q. Are we to go into the question of machines?

A. You asked me about it.

COURT.—Not talking about that. The patent does not cover that. It is a patent for a process for making brick waterproof.

A. Ask the question again, please.

Question read.

COURT.—So specified in the patent.

A. The common brick is, yes. Now, let me qualify that.

COURT.—Counsel asked you if the brick you used to-day [73—16] was the semi-dry class.

A. It would be in that class, yes.

Q. What constituent elements are used in the manufacture of semi-dry bricks?

A. Sand, aggregate and cement—I mean cement, aggregate and water.

Q. By aggregate in that definition, what do you mean?

A. It might be sand, gravel, crushed stone, crushed slag, marble dust, or the like.

Q. What aggregate, using it in that sense, do you use in your manufacture to-day?

A. What is known as concrete sand mixed with the proper proportions of mason's sand to properly fill in the voids.

Q. Any sort of sand would answer the purpose.

A. No, sir, clean, washed sand would answer the purpose.

(Testimony of David F. Shope.)

Q. But you can make a brick of any sort of sand as an aggregate. A. No, sir.

Q. You couldn't?

A. Not make it merchantable. Could make one, yes.

Q. That is what I want to know, could make a brick, but to have a good brick you always use a certain kind of sand? A. Always.

Q. Mix that with a certain proportion of cement?

A. And water.

Q. But you use a certain proportion of cement?

A. I do.

Q. Is that proportion fixed or variable?

A. It is fixed by city ordinance here, and most other cities throughout the United States.

Q. I am speaking now generally of the manufacture of bricks. You can use different proportions of sand and cement, can't you?

A. You must comply with the city ordinances.

COURT.—Leave the city ordinance out. [74—17]

Q. We are talking about brick now, not about city ordinances.

A. I just wanted to know if talking about merchantable.

Q. I am talking about brick.

A. Read the question, please.

Question and answer read as follows: (Is that proportion fixed or variable?

A. It is fixed by city ordinance here and most other cities throughout the United States.)

(Testimony of David F. Shope.)

Q. What do you mean by fixed? A. City code.

COURT.—Never mind about the city code.

Q. Leave out the city code.

COURT.—Leave the city code out. We are not concerned about that. In making brick, do you have to use the same amount of sand always?

A. No, you do not have to.

Q. That is all I want to know. To what extent may the proportion of sand and cement be varied in practice?

A. In practice no two manufacturers manufacture alike. Ordinary good aggregate would be one, two and a half, three, or one, three, three—one, three, five depending on the specifications to be met.

Q. What is the least amount of cement in proportion to the aggregate that you can use to make a brick that will hold together?

A. Possibly one to fifteen.

Q. What proportion do you use in your own manufacture? A. One, three, three.

Q. What does that mean—one, three, three?

A. One part cement, three parts fine sand, and three parts coarse sand and fine gravel.

COURT.—That makes it one to six.

A. Yes, sir. [75—18]

Mr. ATKINS.—I think, your Honor, that the witness is referring to volume.

COURT.—He said one part cement to six parts aggregate.

Mr. ATKINS.—No, one part cement and three parts aggregate, as I understand. The aggregate is composed of equal parts—

(Testimony of David F. Shope.)

A. No, six parts of total aggregate.

Q. I wasn't sure about that. Now, to that mixture of cement and aggregate do you add anything else? A. Not in making common brick.

COURT.—You add water.

A. I said water, cement and aggregate in the first question.

Q. But you use water? A. Yes, sir.

Q. How much water do you use in your manufacture?

A. About two ordinary buckets of water to a bag of cement, and six cubic feet of aggregate.

Q. You depend upon the presence of the water and cement to hold your aggregate together and make your brick, don't you? A. Yes, sir.

Q. That dry brick is not then actually dry.

A. No, the dry name would designate it as semi-dry as against cast stone or flowing mixture.

Q. The invention alleged to be found in the patent in suit—I believe there is only one—was made by you when?

A. The same year of the—about 1908 or '09, I believe some year before applying for a patent.

Q. It was not before 1908, then?

A. I might have been experimenting along those lines, yes.

Q. I am talking about inventions. When had you made this invention?

A. Well, I would have to review the patent there. My application [76—19] was 1909. That was when I started to protect the invention, but at least a year or more before that I was dabbling in this proposition.

(Testimony of David F. Shope.)

Q. But you don't know how long before the date of the application you made the invention.

A. A year or better, I should say; over a year.

Q. Well, you have no accurate knowledge, then, of the date? A. No, I didn't set it down.

Q. Now, you say that when you began your investigation of this line, there was waterproof brick on the market? A. No, sir.

Q. I think that is the statement you made on direct examination. A. I did not.

Q. I think that is correct, but rather than take time to examine it—

A. There was some reference to waterproofing compound, not waterproof brick.

Q. Explain then a little more fully what you do mean by waterproof.

A. The only attempt to waterproof brick, if it was in vogue at that time, was to add a chemical that would prevent the moisture from penetrating the semi-dry product.

Q. Then, as far as you knew, when you began, the use of a coating a neat cement mixture was not recognized as a waterproof covering or coat?

A. No, sir.

Q. If there was, you didn't know anything about it? A. No.

Q. You have testified that your invention is conceived by you to have consisted in incorporating more water in semi-dry brick, is that right? [77—20] A. On the face.

Q. Please explain just what you mean by that, so the Court will understand it.

(Testimony of David F. Shope.)

A. By puddling the face of the semi-dry product with additional water, or trowelling.

COURT.—Trowelling into the surface.

A. Trowelling, floating, stippling, whatever the addition might be.

Q. The covering of a surface made of porous material, or specifically of cement mixture with a trowelled coating was not new at that time, was it?

A. I never had heard or seen of it, or any green product faced in like manner, or I would not have sworn to be the true and original inventor of my patent.

Q. Then you conceived at that time that you were the first one to trowel a coating upon cement base.

A. Upon a cement brick or block.

Q. You draw a distinction between a cement brick and a sidewalk, for instance?

A. I certainly would.

Q. In what respect? In what particular?

A. In the respect that we use a sidewalk to walk on and brick to build buildings out of.

Q. You never heard of a pavement built of bricks? A. Yes.

Q. Then you would walk on brick in that case?

A. Yes, that is the first brick sidewalks were walked on mostly.

Q. Then that distinction hardly obtains, does it, between the two manufactures?

A. I may be a little bit thick there to know just what your [78—21] intention is, Mr. Atkins.

COURT.—You said your distinction between a sidewalk and brick was one was to walk on and the other was for some other purpose, and then counsel

(Testimony of David F. Shope.)

asked you if sidewalks were not made of bricks and you said yes, and then he asked you if your distinction held good.

A. My distinction in the product of trowelling the brick does hold good.

Q. But you have no patent on the product, I believe. A. Not on the product.

Q. It is altogether on the process?

A. It is altogether on the process.

Mr. ATKINS.—I want to offer in evidence certified copy of file-wrapper and contents of Patent 985,709, which is the patent sued upon.

Mr. RANKIN.—I think that belongs in your case in chief, but we have no objection.

Mr. ATKINS.—It would have been offered that way, but I don't know as it makes any difference particularly as I wish to ask the witness a question in regard to it.

Marked Defendants' Exhibit "B."

Q. Referring to the amendment dated April 8, 1910, as set forth in Exhibit "B" just offered, you will find a substitute Claim 1 in the following language: "1. The herein-described method of forming a waterproof faced cement block which consists in first mixing cement and sand in a semi-dry state and molding it into a block, next covering the face of the block with water and then sifting dry sand thereon, whereby the water will carry the added cement into the pores of the block without the application of external pressure." I further call attention to the fact [79—22] that in the official action on that claim, dated April 19, 1910, the following language is used: "Claim 1 covers nothing beyond

(Testimony of David F. Shope.)

the ordinary process of laying cement sidewalks, when the surface of the pavement is coated in whole or in part with water brought to the surface by tamping. It is accordingly rejected on Haddock." I now ask you to state whether or not you accepted, through your attorneys that rejection, and abandoned that claim? There is the record of it.

A. I remember my attorney handing me several patents pertaining—or cited as an infringement against my application. I asked him to review them and then requested that he go with me, and observe the making of the brick and see if he there saw any similarity at all. After doing so he agreed that there was not and proceeded with more direct information to the prosecution of my patent.

Q. How do you reconcile that statement which you have just made with the fact that the statement of the Examiner was accepted to be correct and that claim was erased upon the rejection predicated upon the statement?

A. I lay it to my attorney not being familiar with the actual operation when writing that claim or making that.

Q. But he was familiar with it when he erased that claim?

A. In other words, he got the wording conforming to the way I was doing instead of his conception of my telling him.

Q. You are acquainted with Claim 1 of the patent in suit? A. Yes.

Q. I will ask you to compare that Claim 1 with Claim 1 which was erased as set forth in the last preceding question and to state wherein the inven-

(Testimony of David F. Shope.)

tion as defined in the two claims, if it exists, is to be found?

Mr. RANKIN.—I want to object to that, your Honor. This [80—23] man says he doesn't qualify as a scientist. He is a practical brick man.

COURT.—He doesn't pretend to be an expert in patents. I suppose anyone can read the two claims and see where they conform.

Mr. ATKINS.—If your Honor please, this is the man who made the invention, and what I want to get at is a statement from him where he shows any distinction between the one and the other. He certainly must have considered that there was some difference there, and it seems to me the Court would be aided in considering that point. I can't see any difference for my part.

Mr. RANKIN.—As long as he inquires what he was doing, I don't object, but I do object to asking him to interpret someone else's language. I think that is entirely outside the province of the witness.

COURT.—Interpreting his own language now.

Mr. ATKINS.—This is over his signature.

COURT.—He signed it anyway. He can state if he recognizes any difference between the two claims.

Mr. RANKIN.—Save an exception.

A. It seems the only change is in possibly the construction of the amount of water in it.

Q. That is the only difference you see?

A. That is the first step in the operation.

Q. Do you see any other difference?

A. Without rereading it and taking a lot of time here, no, sir. That explicitly I will say, no.

Q. Is there any difference between the process

(Testimony of David F. Shope.)

defined by that claim 1, which was rejected and erased from the record by you, and Claim 1 which appears in the patent? I am asking [81—24] you about the invention now, not about the language of the claim. Is there any difference?

A. There was no difference in my actual operation, but I don't call to mind just how this specification was arrived at.

Q. The erasure of that Claim 1 met with your approval, didn't it, at the time—that Claim 1 which was erased, I mean.

A. That is what I hired a lawyer for. I was trying to convey to him my actual operation at all times.

Q. In your direct examination you stated that your invention was conceived by you to consist in incorporating more water in the brick?

A. The face of the brick particularly.

Q. In the face of the brick, that is to say, getting more water into the body of the brick by the application of water to the face?

A. Enough to make a perfect bond between the face and the body.

Q. You also in that same patent referred to ornamentation as part of your invention. The ornamentation does not enter into the patent, does it?

A. The specification reads, "or otherwise treat, as may be desired." That is considered ornamentation.

Q. That is a matter of construction by the Court. I will pass that by. When you seek to incorporate more water into the brick by application of water to the face of the brick, does it make any difference

(Testimony of David F. Shope.)

in fact whether you add the water separately and afterward apply the cement or not?

A. The agitation is perfected in either case. The agitation in either case perfects—

Q. But your first claim calls for no agitation. I am asking a simple question whether it makes any difference where you put your water on with respect to the addition of the cement?

A. Not materially. [82—25]

Q. Makes no difference. You can get the same result by the sprinkling of water and cement together on the face of the brick as by putting first water on the brick and then adding cement?

A. Yes.

Q. And as a matter of fact in your manufacture, you do sprinkle the water and cement simultaneously upon the face of the brick, don't you?

A. That depends upon the dexterity of the operator. No two of them do exactly alike.

Q. And it doesn't make any difference what they do? A. No.

Q. You have in your cross-examination used the term "puddling." Please explain to the Court what you mean by puddling?

A. Where was the term used?

Q. You used it just now in cross-examination.

COURT.—What do you mean by puddling?

A. Agitating the mixture.

COURT.—Agitating what?

A. The cement, coloring matter and water, marble dust, whatever you may apply.

COURT.—On the surface of the brick, the face of the brick? A. Yes.

(Testimony of David F. Shope.)

Q. And you regard that puddling operation as the same as adding water and afterwards cement to the face of your brick?

A. The completion of the operation.

Q. But the first claim calls for the application in order of water and then the cement? A. Yes.

Q. Now, you claim that you regard puddling as the same thing as that?

COURT.—Puddling, I understand, is the agitation of the water [83—26] and cement after it is applied? A. Yes.

Mr. ATKINS.—There may be some question as to whether puddling means the mixing of cement and water to the consistency of ordinary mud, or whether puddling means agitation or the mixing of them together in the application. It may be a matter of some importance because of the prior art, as we shall afterwards show your Honor, shows that the application of a mixed body of water and cement. I am giving him an opportunity to draw the distinction, if there is a distinction.

A. Between puddling and agitation?

Q. Well, you said puddling is a mixing of it?

A. Yes.

Q. Do you know what the term slurry means, which is used in these patents?

A. A cementitious material of water and cement that is soft enough to flow or screen easily.

Q. Now, that slurry you regard as the same—the application of that slurry you regard as the same as the process you describe in your patent? A. I do.

Q. You think your patent covers the application of slurry to cement brick.

(Testimony of David F. Shope.)

Mr. RANKIN.—If the Court please, I have an objection, and I presume my objection is running to all this evidence, because this witness said upon direct examination he is not a scientist, and this goes into the question of the prior art here, which the witness has specifically said he has no knowledge of.

COURT.—This is whether he regards the two processes the same; not the prior art. [84—27]

A. I do.

Q. You have also used the term "stipple." Please define to the Court what you mean by stipple.

A. By taking a stipple brush or whisk broom and by impinging blows roughen the texture to the desired result.

Q. That is to say, you strike a plastic surface with a brush directed along the longitudinal line of the bristles of the brush, and you get a stippled effect?

A. Yes.

Q. That you knew to be old in the art before you entered the field of invention? A. Yes.

Q. You have testified that the extent of your business is five hundred thousand dollars, as I understand it.

A. The amount of the licenses total price, but that includes machinery, installation and overhead, and a thousand things that make it up.

Q. Does that mean income or paper?

A. No, that means total cost of the installation.

Q. And it may be represented in large part by paper which you have taken for licenses?

A. It is represented by the machinery and equipment to produce certain capacity per thousand

(Testimony of David F. Shope.)

bricks per day. Sometimes I sell machinery. Sometimes I go and equip the whole plant.

Q. You mean to say you have sold five hundred thousand dollars' worth of machinery?

A. Machinery and equipment and patent protection.

Q. In respect to patent protection, have you received cash entirely? A. No, sir. [85—28]

Q. Or part cash and part promises to pay?

A. Like other business, sometimes cash and sometimes partial payments in the way of notes or contracts.

Q. Do you mean to say that you have received in your business five hundred thousand dollars in cash?

A. I wouldn't say five hundred thousand dollars in cash—between four and five hundred thousand dollars, something like that.

Q. In cash?

A. I think so. Four hundred thousand, possibly.

Q. How is that?

A. Possibly four hundred thousand. A lot of these payments are still pending.

Q. Then by cash you mean promises to pay. You regard a promise to pay as cash?

A. No, I do not.

Q. Then you have actually received in cash say four hundred thousand dollars?

A. Something like that, yes.

Q. How much more in paper?

A. Part of that four hundred thousand might have been paper at the time, but was eventually cash.

Q. Besides the cash and paper which has been

(Testimony of David F. Shope.)

converted into cash, how much promises to pay in addition to that, has your business brought you?

A. Just ordinary steps from installation covering a term of one, two or three years, making the payments sometimes—

Mr. ATKINS.—I don't think that is material, your Honor.

COURT.—I don't see what it has to do with the validity of this patent. [86—29]

Q. You have a general form of license which you issue to those who purchase licenses under your patent?

A. I hardly think I could get that amount of money away from customers unless I did. I do.

Q. Then you say you have a form of license?

A. I have, yes.

Q. You have testified in regard to that without any objection upon my part, because I assumed you had a form of license. A. Absolutely, yes.

Q. Can you produce such a form? A. Yes.

Q. Will you do so?

A. I will, if my counsel says I shall.

Mr. RANKIN.—Have you one here?

A. Yes. I want to qualify that condition, with the consent of the Judge. (Produces.) Have you two there?

Q. Yes, two there.

A. Well, you can have them both. They are always taken in duplicate, one for me and one for the licensee.

Mr. ATKINS.—May I have one copy of that?

Mr. RANKIN.—I have no objection to offering in evidence.

(Testimony of David F. Shope.)

Mr. ATKINS.—I am going to offer in evidence copy of license presented by the witness.

Received without objection and marked Defendants' Exhibit "C."

Q. You have stated that the output of your business, considered as a whole is two to three hundred thousand face brick per day? A. Yes.

Q. That covers all of the output throughout the United States? A. Probably so.

Q. That is an estimate, at least? A. Sure.

Q. Intended to cover the output for the United States? [87—30]

A. Sure. Different grades of brick have larger production, so it must vary in the kind of brick, owing to the fact that we have some seventy-five or eighty different styles.

Q. You have testified that suits which you have brought against alleged infringers heretofore have been settled. A. Yes.

Q. With the exception, I believe, of a suit in Pennsylvania and one in Washington.

A. Washington, yes.

Q. All these infringers were small infringers, as you call them? A. Yes, sir.

Q. That is to say, they didn't have the means to fight a suit?

A. Nor the capital to carry on successfully a business.

Q. You have referred to a suit in Oregon three or four years ago. What suit was that?

A. Not a suit; that was an infringement without any action.

Q. And there was no suit filed? A. No, sir.

(Testimony of David F. Shope.)

Q. And they simply ceased to do business on your threat of suit, or your objection. Was it a threat of suit?

A. I think the incident was this, that I filed a lien on the building where he made brick, face brick, and in order to let him settle up—he said if I would take the lien off, he would be good. I said all right, I would just do that.

Q. What ground for filing a lien had you?

A. Royalties on the use of my product.

Q. Had he signed a contract?

A. He was furnishing brick and laying them on this job.

Q. You have testified that you visited the plant of Ward & Peterson? A. I did. [88—31]

Q. Last year, was it not? A. Yes.

Q. That was the first and only time until you afterwards visited it a few days ago by arrangement with counsel? A. Yes, sir.

Q. How were they manufacturing brick at that time?

A. In the usual way as to the body of the product by mixing sand—

Q. That is semi-dry brick they made in the usual way?

A. And then applying the cementaceous face.

Q. Be a little more explicit, if you please, in the record, in regard to applying cementaceous face. How did they put that on? A. By agitation.

Q. Did they put water on the brick? A. Yes.

Q. By itself? A. After agitation.

Q. I am asking you whether they put just water

(Testimony of David F. Shope.)

upon the face of the brick after they agitated the cement?

A. Not pure water, but in combination with cement.

Q. But they didn't add water by itself?

A. Just before they got through with the operation they did, several times.

Q. Having a brick, what is called a semi-dry brick, did they put any water by itself right on the brick?

A. Not by itself until after the agitation was partly completed.

Q. As a matter of fact, didn't they make a mortar on the side and simply place that on the face of the brick? A. By agitation they did.

Q. That is all they did?

A. No, not all they did; they applied more water. [89—32]

Q. More water to the brick after they had put this slurry on, because that is what we are referring to. A. Yes, repeatedly.

Q. Put more water on it? A. Yes.

Q. Did the putting of slurry appear to you to be an infringement of your process? A. It did.

Q. The application of water after the slurry was on was also an infringement? A. Yes.

Q. Then your postition is your invention covered the application of water and cement in any way by agitation to the face of semi-dry brick?

A. In combination with agitation, I do.

(Testimony of David F. Shope.)

Q. How was this agitation affected?

A. By trowel and stripple broom.

Q. What sort of a trowel did they use?

A. Ordinary mason's trowel.

Q. There are several kinds of mason's trowels, I believe.

A. For plaster and brick laying and painting trowel to be explicit.

Q. It was a metal trowel?

A. Metal plaster trowel.

Q. And you used in your manufacture a wooden trowel? A. All manner of trowels, floats.

Q. Is not the metal trowel a spreading trowel, as distinguished from a float, which stirs up the surface? A. Yes.

Q. And they were using a metal trowel?

A. They were using a metal trowel.

Q. Was there any use made by defendants, as far as you know, of [90—33] anything but a metal trowel that you know of?

A. Not that I know of.

Q. Have you any information other than that which you gained upon this occasion of your first visit to their place?

A. I have. My city salesman went into their plant one time to observe what they were doing. He saw half a dozen more or less of my brick laying on the shelf in sight of where they were working, as if they were seeing whether they could duplicate everything we were doing.

(Testimony of David F. Shope.)

Q. You didn't see—you have no personal knowledge of what your city salesman saw, of course?

A. I think I have his affidavit to that effect?

Q. But you have no personal knowledge?

A. No personal.

Q. Beyond that one visit that you made?

A. Absolutely none whatever.

Q. Did any report ever come to you that they were making their brick otherwise than as you saw them make it?

A. The report came constantly that they were making Shope brick, selling them at a lower price.

(Question read.)

A. The constant report was that they were very similar or exactly like ours.

COURT.—That isn't answering the question.

(Question read.)

A. I never got any report of how they were making of any kind.

COURT.—Then you never got any report on the making of them?

A. No, not any. I want to be explicit.

Q. Then as far as you know they made the one way, and that is as you saw them make it. [91—34]

A. I know nothing prior to the observation the other day. The way they made them then, as I have explained.

Q. You say you were ordered out of the plant?

A. Yes, very urgent request.

Q. What would be the occasion of their ordering you out of the plant?

(Testimony of David F. Shope.)

A. None whatever. That was the surprising part.

Q. Didn't you use insulting language?

A. I did not to start with at all.

Q. To start with?

A. No, sir, we were talking about the whole thing was when Mr. Ward, I believe it was, said he made the brick 20 years ago. I offered him five hundred dollars to get me one. He said, "You get out." Right there the gun was off.

Q. So it was just because you wanted to see a brick you were ordered out. Is that your statement? A. No, I went there to talk it over.

Q. I know but you were ordered out because you asked to see a brick, and offered that money.

A. No, no, they took me over it very nicely, and showed me their brick on the stock pile, but when it came to that point, as I have explained, I was ordered out.

Q. And you state positively that you used no insulting language before that?

A. Before it was over, I might have.

Q. And possibly you used it before you were ordered out?

A. Positively not before I was ordered out. It came just like a clap out of the sky. No occasion for it. We just went in there to talk it over. A surprise to me to be ordered out at that stage of the conversation. I was just out of the hospital, and I didn't arbitrate about going.

Recess until 2 o'clock. [92—35]

(Testimony of David F. Shope.)

Tuesday, May 27, 1924, 2 P. M.

DAVID F. SHOPE resumes the stand.

Cross-examination (Continued).

(Questions by Mr. ATKINS.)

Q. You have stated in your testimony that in carrying out your process or method, you agitated the cement and water upon the face of the brick. Is that correct? A. Yes.

Q. Suppose you applied the water to the face of the brick and then spread the cement or sprinkled the cement on the water, what would be the effect of that agitation?

A. Why, it would leave the surface of a kind without any material ornaments, but would be more waterproof than ordinary common brick would be.

Q. And you hold that by such treatment you would get any penetration of the brick by the cement and water added to it without the agitation?

A. Yes.

Q. You would? A. Yes.

Q. Then agitation is not necessary to your process?

A. It adds perhaps to the bonding and penetration both.

Q. In your patent you refer to pores and interstices as being penetrated by the added mixture of cement and water. What do you mean by pores and interstices there? A. Voids.

Q. Do you mean all voids that might be present?

A. Well, without a magnifying glass, I couldn't answer that question.

(Testimony of David F. Shope.)

Q. Suppose the operation were raked up, would those be pores or interstices as you designate them by that term in your patent?

A. Simply raked up? [93—36]

Q. Yes.

A. It wouldn't change the void quantity materially, laying flat or raked up a little possibly.

Q. You know, as a matter of fact, that when you tamp a semi-dry brick into this mold that brick is porous? A. Yes.

Q. Now, are those the pores that you refer to when you say that the cement applied to the face of that will penetrate them? A. Yes.

Q. And you say that there is no distinction between them and any voids that may be present by reason of the roughness of the surface of the brick?

A. Raked up, there might be more voids.

Q. Would those be pores, that is what I want to know, in your contemplation of the patent?

A. Just the same condition except misplaced, whether it was up or down; I suppose might not be quite so dense when raked up as when tamped in, might be a little more in that part that was raked up.

Q. Suppose that in facing of the brick as you make it you coat them with a layer of small pebbles. Would the spaces between those small spaces be what you mean by pores? A. No.

Q. They would not be pores? A. Disconnected.

Q. They would be voids, nevertheless, would they not?

(Testimony of David F. Shope.)

A. Well, I think it would be more open space.

Q. What is an open space but a void?

A. Well, all right, void it is.

Q. Then you do draw a distinction between pores and mere voids. Do you wish to be understood as saying that? [94—37]

A. I don't see any material difference between the two.

Q. Then you still insist, would you, that pebbles applied to the face of a concrete structure or mass in its plastic condition would constitute pores?

A. No.

Q. The difficulty is to get you to define what you mean by pores or interstices. Now, you say they are voids but you draw a distinction between some voids and other voids. Now, what do you mean by pores or interstices with this explanation?

A. I am not an analytical chemist, and perhaps I am not able to answer your phraseology in the terms which you intend.

Q. Then you had no particular reason for the words pores or interstices in your patent?

A. I hired a patent attorney to help me impart my intent.

Q. And your intent was to pour that cement or a mixture of cement and water on to the brick, and it would enter where it could in there, and would be excluded perhaps where it couldn't enter?

A. That is the idea. Capillarity had something to do with it.

Q. So it resolves itself into this; That you

(Testimony of David F. Shope.)

regard the term pores or interstices as fully equivalent of the term void, do you?

A. I couldn't tell you the technical difference.

Q. When you apply your coating of mixture to the face of a green stone and agitate it, will you take up any portion of sand that is present in the brick by that agitation?

A. Possibly some very slight particles.

Q. Do you know, as a matter of fact, whether you do or do not take some of the sand up by agitation, as you call it, which you apply to the coating mixture? A. I would say so, yes.

Q. Besides that your coating mixture is not necessarily neat [95—38] cement, as I understand it. I think you so specified. A. Yes.

Q. It may be a mixture in itself that includes some sand? A. Or coloring matter.

Q. Well, it might include sand, I think you also said? A. Yes, or marble dust.

Q. A small mixture of aggregate, but a rich admixture of cement? A. Yes.

Q. Now, you say that you agitate this coating mixture—how do you agitate it in your manufacture of your brick?

A. With various instruments, known to the trade as floats, trowels, brushes, wire combs.

Q. When you use a float, which, as I understand it—you will correct me if I am mistaken—is a wooden trowel, you apply considerable pressure to the trowel or float against the coating mixture, don't you? A. Yes.

(Testimony of David F. Shope.)

Q. And it is by reason of that movement of the trowel over the surface under pressure that you get the desired result? A. Yes.

Q. Then in your patent when you say that you accomplish this without pressure, is that a correct statement or not?

A. As to some prior operation where pressure was applied to force it in instead of agitation—that is what I meant.

Q. Then you didn't intend to exclude all pressure but some of the pressure. A. Some pressure.

Q. I hand you Plaintiff's Exhibits 3 and 4, 9 and 10, and will ask you to state what Exhibit 3 illustrates.

A. A Shope Brick Machine describing the agitation of a float.

Mr. RANKIN.—We cannot hear you. [96—39]

A. Showing a brick machine with the action of the float or agitating.

Q. In Exhibit 3, the picture shows the machine filled with the semi-dry mixture after it is tamped, and after the coating mixture is applied, does it?

A. Yes.

Q. Plaintiff's Exhibit 4 shows the method of applying the coating mixture? A. Yes.

Q. Exhibit 9 shows, does it not, the tamping operation? A. It does.

Q. That operation is for the purpose of packing the mass of semi-dry mixture in the machine, is it not, in the mold of the machine, is it not?

A. Yes.

(Testimony of David F. Shope.)

Q. Plaintiff's Exhibit 10 shows, if I understand it correctly, the molded semi-dry brick before the application of the coating, is that right?

A. No, the finished brick is being released from the machine.

Q. After the coating? A. Yes.

Q. And until the coating is applied the brick remains in the mold? A. They do.

Q. The float is applied on top over the top of the mold partitions? A. Yes.

Q. And in order to reach the end of the brick you drop down the gate which exposes in some manner or in like manner the end of the bricks as the tops are exposed? A. Yes.

Q. And they are treated in the same way, substantially? A. Yes.

Q. In your testimony you have referred to two kinds of machines [97—39] which you saw in defendants' plants? A. Yes.

Q. You saw only two types there?

A. Only two.

Q. Please explain what machine that is which is shown in Plaintiff's Exhibit 7?

A. It was known as the six-brick machine, making six bricks at a time.

Q. How is the tamping done in that machine, do you know?

A. It would have to be done by hand.

Q. In Plaintiff's Exhibit 6, what is shown?

A. The manner of facing the brick on the end.

Q. What type of machine is shown in this exhibit?

(Testimony of David F. Shope.)

A. The same as mentioned in the previous question.

Q. The same as shown in Exhibit 7? A. Yes.

Q. Now, the other machine and the second of the only two you saw is shown in Plaintiff's Exhibit 5, isn't it?

Mr. RANKIN.—I want to object. It goes only to the question of machines, and is no part of the process; it is only taking up time.

Mr. ATKINS.—The witness has testified to seeing these machines and relying upon them.

COURT.—The plaintiff has offered photographs. I don't know what bearing it has on the case.

Mr. ATKINS.—Not at all, but it is offered as evidence of infringement, and we want to make it perfectly clear to the Court, as it will be when your Honor reads it.

A. Shall I answer the question?

COURT.—Yes.

A. Yes. [98—40]

Q. The brick shown in Exhibit 5 are ready for treatment after the manner illustrated in Plaintiff's Exhibit 6, are they not?

A. No, they are finished.

Q. Those are finished brick?

A. Those are finished brick.

Q. In Exhibit 5? A. They are.

Q. You mean after the application of the coating?

A. Yes.

Q. Of the float? A. Yes.

Witness excused. [99—41]

TESTIMONY OF WILLIAM G. FIELDER, FOR PLAINTIFF.

WILLIAM G. FIELDER, a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination.

(Questions by Mr. R. R. RANKIN.)

You are a resident of Portland, Oregon?

A. Yes.

Q. Where are you employed?

A. Shope Brick plant.

Q. How long have you been employed there?

A. Four years and a half.

Q. Do you know Mr. Ward and Mr. Peterson?

A. Yes, that is, by sight.

Q. When did you first see them?

A. About a year and a half ago

Q. Where? A. At the Shope Brick plant.

Q. What were they doing?

A. Looking around.

Q. Just describe to the Court what you observed them doing at the Shope Brick plant?

A. Why, I first took notice of them, they were walking around looking at the dry kiln. They came over and asked me what was the proportion of cement I used in mixing the concrete. I told him what I used. They went on talking a little bit, and I didn't pay no further attention to them, and they stepped off the platform where I worked with the concrete mixer, and says: "What is this thing?"

(Testimony of William G. Fielder.)

"That is a blower or fan we use for drying bricks." And I stepped down to turn [100—42] off the button. Just then our foreman walked out the door up there from the steps above from the other department. Before I could get to see what he was after, and doing any further than that, Mr. Ward and Peterson, these two gentlemen, rather—I didn't know their names at that time, walked out in a hurry. I just stood and looked at them. Thinks what's the matter with them fellows? What are they in such a hurry about? And watched them clear out the door; that is how I come to recognize them again, otherwise never paid any further attention to them.

Q. When did you see them again, Mr. Fielder?

A. Here on May 14th, when they were at the plant.

Q. This last May? A. Yes.

Q. This month? A. This month.

Q. Were there other workmen there at the time you were there? A. Yes, sir.

Q. What is your position in the plant with respect to other workmen?

A. Why in mixing the concrete with these other workmen.

Q. Where are they with respect to where you are?

A. They are down below; I am up on a platform where the concrete mixer is; they work around that platform.

Q. Were there other workmen at the platform or below the platform at the time you were on the platform? A. Yes.

(Testimony of William G. Fielder.)

Q. What were they doing?

A. Making brick.

Q. What kind of brick?

A. Face brick. [101—43]

Q. Do you remember what kind of face brick they were making?

A. I couldn't say positive whether they were cream, but they were a wire cut brick, may have been red.

Q. Did you see them talking with other workmen?

A. No, sir.

Q. How long were they there at the plant?

A. Well, to the best of my knowledge, probably fifteen minutes.

Q. Do you know Mr. Claude C. Clark?

A. Yes, sir.

Q. Does he work in the same part of the factory you work in?

A. No, sir, up in another department.

Q. Is it partitioned off? A. Yes, sir.

Q. How many machines were working there by the other workmen? A. Three machines.

Cross-examination.

(Questions by Mr. ATKINS.)

Do you remember the names of any of the men working with you in the plant when Ward and Peterson visited it as you state? A. Yes.

Q. Who were they?

A. One was Mr. Rohr, one Mr. William Harkin, and one Fred Seefer.

Q. You are sure that those were all there?

(Testimony of William G. Fielder.)

A. Yes, they were all three there.

Q. Do you know whether they saw?

A. They undoubtedly saw the men but whether they took any notice of them I don't know, I couldn't say. [102—44]

Q. Do you notice any change in Mr. Ward's appearance?

A. I should say he was heavier, here to-day, a little.

Q. He is bigger now than he was then?

A. I think so.

Witness excused. [103—45]

TESTIMONY OF CLAUDE C. CLARK, FOR PLAINTIFF.

CLAUDE C. CLARK, a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination.

(Questions by Mr. RANKIN.)

You live in Portland, Oregon? A. Yes, sir.

Q. By whom are you employed?

A. Shope Brick Company.

Q. How long have you been employed by the Shope Brick Company? A. Five years.

Q. In what capacity?

A. A year and a half as a helper, three years and a half as a brickmaker.

Q. Whereabouts in the plant do you work with regard to the other workmen, the majority of the workmen in the plant?

A. In the mantel department.

(Testimony of Claude C. Clark.)

Q. Is that separated from the main part of the factory? A. Yes.

Q. How? A. By a board partition.

Q. Do you know Mr. Ward or Mr. Peterson.

A. I don't know Mr. Ward. I know Mr. Peterson.

Q. You do know him? A. Yes.

Q. How long have you known Mr. Peterson?

A. To know his name, since the 14th day of May.

Q. This May? A. Yes.

Q. When did you see him prior to that?

A. As I recollect, about two years ago, maybe it might be a little less. [104—46]

Q. And where did you see him then?

A. I saw him in the mantel department.

Q. What was he doing?

A. Well, he came in through the door from the yard where the brick machines are, he came in there and looked around; finally he came up; I was making tile at the time; he came up to the stack of tiles I had there, I guess must have been twenty-five or thirty foot; he comes up, takes a two-foot rule out of his pocket, measures the length of the tile pallet, the depth, the width, also measures the thickness of the tile, the length and depth.

Q. Did you say anything to him? A. I did not.

Q. Why not?

A. I didn't know what his mission was.

Q. Are there many visitors come in there?

A. A few.

Q. How long was he there?

(Testimony of Claude C. Clark.)

A. About ten minutes.

Q. What did he do then?

A. Stood and watched me making tile; finally he whirled around and went the way he came.

Q. Where was this? Where was the Shope Brick plant at that time?

A. East Eighth and Division.

Cross-examination.

(Questions by Mr. ATKINS.)

The Shope Brick plant was open to visitors, was it? A. I think so. [105—47]

Q. And you regarded this man whom you have testified as having seen as doing nothing but what other visitors did?

A. I never saw anybody do that before.

Q. Never saw anybody do that before?

A. Not so accurate.

Q. What do you mean by "not so accurate?"

A. Well, to take so much pains to take such measurements.

Witness excused. [106—48]

TESTIMONY OF THOMAS BILYEU, FOR PLAINTIFF.

THOMAS BILYEU, a witness called on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination.

(Questions by Mr. RANKIN.)

Where do you reside, Mr. Bilyeu?

A. Portland, Oregon.

(Testimony of Thomas Bilyeu.)

Q. How long have you so resided here?

A. For about eighteen years.

Q. What is your profession?

A. I am a mechanical engineer.

Q. What have you done to qualify yourself in that profession?

A. Graduated at the Oregon Agricultural College with the degree of B. S. in Mechanical Engineering, and took a post-graduate course at Cornell University in the same line.

Q. Have you ever been an expert in litigation?

A. I have.

Q. Along the line of your training?

A. Once or twice.

Q. Have you made a careful study of the Shope Patents? A. I have read the one in question?

Mr. ATKINS.—Do I understand this witness is to be qualified as an expert in cement construction?

Mr. RANKIN.—I haven't so qualified him as yet.

Mr. ATKINS.—I notice that.

Q. You said you had read the Shope Patent?

A. I have.

Q. Have you seen the workmen operate in the Shope Brick plant? A. I have.

Q. What experience have you had in the matter of cement and cement construction and manufacture of cement products?

A. I have had some experience.

Q. And what is it, please? [107—49]

(Testimony of Thomas Bilyeu.)

A. Extended over a period of a number of years contracting.

Q. What construction?

A. Well, I had the shore work on the Broadway Bridge here as one of the jobs I was on; handled the work personally. A number of other structures around Portland; on Kings Heights in this city all of the concrete walls; the McCleay Boulevard; Grand Oak Hotel foundations, in Portland.

Q. I don't know whether you testified to this or not. You have seen the workmen operate in the Shope plant? A. I have.

Q. How long have you observed them operate there?

A. I have been over there a number of times watching their operation.

Q. You may just briefly detail to the Court what that operation is.

A. The aggregate of sand and cement is tamped there, depending on what they are making; if it is faced brick they are making it is tamped by mechanical operation, the machine being manually operated, into the molds. The surface material is then struck or raked from the surface. Then the water and cement is applied to the surface of the brick, and the same is agitated, different workmen having a little different technique in the method of operating but in the main it is the same. Then the final surface treatment depends upon the character of the bricks that they are making, that is, if to be wire drawn, or whatever the surface trim is to be.

(Testimony of Thomas Bilyeu.)

Q. After you have the green brick or green block will you then in more detail explain just what is done there at the plant; after you have the green block in the machine.

A. After you have—

Q. The green brick in the machine; just describe the further steps in detail. [108—50]

A. I notice some of the workmen, they usually have a water pot in their left hand, and a cement bearing carrier in their right hand, and they ply the water across the brick and then back two or three times to thoroughly coat the surface of the brick. It is then agitated with an instrument to thoroughly agitate the surface coating of the structure.

Q. Would you say that that agitation was with pressure?

A. With some pressure, yes, I would say that it was.

Q. And what is the principal function of that agitation?

A. To thoroughly mix the materials that have been applied upon the surface.

Q. What becomes of this moisture that is then upon the face of the brick?

A. In my opinion it would have a tendency to enter the brick structure.

Q. Doing what after entering?

A. Filling up the interstices or pores of the brick.

Q. Have you seen the defendants operate?

A. I have.

(Testimony of Thomas Bilyeu.)

Q. Where?

A. At the plant of Ward and Peterson in Portland, Oregon.

Q. And when was this?

A. On the afternoon of May 14, 1924.

Q. Will you describe in detail to the Court what was done in the manufacture of the face brick as you observed the defendants in their operation?

A. The faced bricks were made in two machines one of which was a manually operated machine. The material was shoveled into a hopper or upon the machine until the brick molds were filled. It was then rammed with a hand rammer; the surplus material was then struck from the face of the brick. Previous to that, upon an elevated platform perhaps three feet high [109—51] and three feet square, I would say, a cementaceous material was placed and with a trowel a crater was made in which water was poured. A trowel was then used to make a mortar of the same material. It was then applied upon the face of the brick with a trowel, going back two or three times for more material until a complete surface coat was created. Then a whisk-broom was used; the whisk-broom was first dipped into a barrel of water; the face of the brick was then stippled where the coating had been applied with the trowel. They went back on at least two occasions for additional liquid, Mr. Ward being the brick-maker, stated that the broom having not been used and being dry didn't work as well as it would

(Testimony of Thomas Bilyeu.)

had it been wet or had been thoroughly saturated with water before.

Q. Mr. Bilyeu, in what you observed there in your opinion was that the same or substantially the same as indicated in the Shope invention.

Mr. ATKINS.—Object to that. The witness has not qualified as an opinion expert.

COURT.—I think he can answer the question for what it is worth.

A. In my opinion the result was the same.

Cross-examination.

(Questions by Mr. ATKINS.)

You have testified, Mr. Bilyeu, that when, what we will call the surface coating, is applied to the surface of the formed brick, there is a tendency of the cement to enter the pores of the brick.

A. I did not intend to testify—

Q. Did you intend to testify that there was a penetration or only a tendency towards penetration? [110—52]

A. In my opinion there is a penetration.

Q. That is purely a matter of opinion?

A. Purely.

Q. You have never tested it out and investigated it? A. Not to the degree of measurement, no.

Witness excused.

Plaintiff rests. [111—53]

TESTIMONY OF ANGUS FLEMING, FOR DEFENDANTS.

ANGUS FLEMING, a witness called on behalf of the defendants, being first duly sworn, testified as follows:

Direct Examination.

(Questions by Mr. ATKINS.)

Do you live in Portland, Mr. Fleming?

A. Yes, sir.

Q. How long have you lived here?

A. Thirty-six years it is since I made my home here, and kept my family here all the time. I was away some of the time; of course, kept my family here and made my home here, my residence.

Q. What is your occupation?

A. I am inspector for the city of Portland at present on the public works. Have been for over twenty years now.

Q. In that capacity have you had any experience in cement, and in the construction of articles from cement? A. Yes.

Q. Please state to what extent.

A. Well, when I went to work for the city I was counted an expert by others, and so have been in court several times right on that matter, and been in charge of cement work there—in charge of all the permit work for quite a while. Was chief inspector for over six years, which takes in all the concrete pavements, sidewalks, walls and such like.

Q. Are you acquainted with Mr. Ward?

A. Yes, sir.

(Testimony of Angus Fleming.)

Q. How long have you known him?

A. Well, I think about '08, I think it was, when I became acquainted with him first; he was a foreman for a contractor. [112—54]

Q. Do you know what work he was engaged in at that time?

A. Sidewalks, steps, street work, pavement construction, anything in connection with that.

Q. Did you regard him as an expert artisan in cement construction?

A. Yes; I counted him a good, fair man at it, but like the rest of us, of course we had something to learn from one another always. Still learning.

Q. I hand you Plaintiff's Exhibit 1, which is a copy of the patent sued upon, and will ask you to state whether you are acquainted with the contents thereof.

A. Well, I read part of it once; that is all that I read. The portion here explaining—I couldn't pick it out just now—explaining where the patent is taken, I believe this is it.

Q. And you are more or less acquainted with this? A. Oh, yes, yes.

Q. In Claim No. 1 of that Patent, I read: "The herein described method of forming a waterproof faced cement block which consists in first forming the block of suitable material in a semi-dry state."

A. Yes.

Q. How long have you known from your personal knowledge of the making of cement blocks in a semi-dry state?

(Testimony of Angus Fleming.)

A. Well, let's see; I guess twenty-two years in the cement blocks. Now, I wish to state here, too, that according to where we put concrete, we would use the semi-dry, no matter where it was. In sidewalks in certain places we had to use the semi-dry. While I am not a great believer in semi-dry cement, yet we had to use it.

Q. And that use of the semi-dry cement mixture extends back to your knowledge for a period of twenty odd years? Yes. [113—55]

Q. Did you ever apply water to such a block or structure?

A. If we wished to put any coating on it.

Q. But you did it?

A. Oh, yes, certainly; there was no other way to do it.

Q. How long have you done that?

A. Take, for instance—it is comparatively the same thing—a wall or anything else—after we strip it, and wish to plaster it, we had to put water on first, and then plaster it.

Q. What do you mean by plaster in that connection?

A. Laying it on, putting it on with a trowel, exactly as has been described here; putting the face on the brick.

Q. In putting that coating on the wall, for instance, it was sometimes made of cement?

A. Certainly; cement and sand.

Q. Cement and sand. Which do you mean? Do you know it to be made of neat cement mixture?

(Testimony of Angus Fleming.)

A. Well, no, neat cement don't work well because it cracks, what we call map cracks in it if you make it too rich; or, if you have a first-class cement. We used to use a cement a few years ago called Alsen; if you didn't use more sand in that than you did in the average cement, we had what we called map cracks because it was too rich; it was pretty good cement; best cement I ever found.

Q. Neat cement would make a coating, but it would crack?

A. We are apt to have map cracks in it, yes. Spoil the looks of it.

Q. Then the making of cement blocks from cement, semi-dry mixture of sand and cement, and the application of moisture or water and cement to that block has been known to you for some time?

A. We have been putting in sidewalk for—Oh, I suppose right in this city ever since I came here they have been using exactly [114—56] that same thing. In fact, the Ordinance called for that making to a great extent; semi-dry bricks, we had to put it in there dry enough and tamp it until we brought the moisture to the surface or were practically semi-dry, and then put the coating on, put the facing on it and trowel it in.

Q. What was the facing you troweled in?

A. Cement and sand.

Q. And that was the water that appeared on the surface or did you add more water?

A. We added more water.

Q. The water that arose to the surface from the tamping was comparatively small in quantity?

(Testimony of Angus Fleming.)

A. It depended on how damp the concrete was. If we happened to get a bucket or two too much water in, we had more moisture come to the surface.

Q. A block made of semi-dry mixture would contain pores, would it not? A. Certainly.

Q. What would you mean by pores in that connection? A. Well, I would say voids.

Q. It would include all voids.

A. Yes, I would say all; we never use the word pores; we would say voids.

Q. And what would you mean by voids?

A. All things are porous, even a glass bottle; it is porous, you know that.

Q. And in your language you would refer to a glass bottle as having such voids in it as you have referred to?

A. No; it is very hard to stick cement on glass, because the voids or pores are not large enough, so it would be pores. [115—57] You want a certain amount of roughness if you are going to stick cement on.

Q. If you apply, say a mixture of cement and water to the base of a semi-dry block? A. Yes.

Q. What will be the result?

A. That is, if you go to put that mortar on there?

A. Yes.

A. It depends on how much dampness there is in the block and how wet you make your facing that you are going to put on there.

Q. Will the cement mixture of the coating enter the pores of the brick?

(Testimony of Angus Fleming.)

A. To some extent if you use water enough and left the water in first before your cement.

Q. You mean to say that the cement will go down into the pores of the block?

A. Oh, to a slight extent, by being wet and using pressure.

Q. What do you mean by a slight extent?

A. Well, I don't know as you could call what the depth would be; you are not going to force it very far in an ordinary brick block; not very porous of course. In very coarse material, for instance, if you have used a great deal of gravel and little sand, would have large pores in it, a lot of holes you can force that facing down into, to some extent more than if you use a large quantity of sand and a small quantity of gravel.

Q. If you made a brick of sand and applied a face coating to that brick or block so made, would the cement enter the pores of that brick?

A. Very little; very little. Will adhere to very little points in it. [116—58]

Q. Will it penetrate further than the surface of the sand particles which are exposed?

A. No, only just in between the sand particles.

Q. It wouldn't enter below the exposed sand particles.

A. Not to amount to anything; you might see with the magnifying glass it had gone down, but it would be very little.

Q. Have you had any experience in the effect of

(Testimony of Angus Fleming.)

pouring or applying a mixture of water and cement to sand, a sand-bed, either tamping or otherwise?

A. Just sand-bed, pure sand, clean sand?

Q. Yes.

A. If you will mix sand—at least cement and water together—and you have a pocket in the sand there, you pour that cement in the sand—take, for instance a mortar, you can make it a very thin mortar of cement and water—and you pour it into that pocket, the cement will not penetrate to amount to anything; in fact, it won't penetrate at all, because the cement will immediately put a coating right over that sand and stop it going down. Of course, a certain amount of water will seep through and gradually seep through the sand, but the cement will not, because it is like a sieve there; in other words, like I have heard that they do—I never done it—but I hear them talking about purifying some nice wine, and sift it through sand; take all the fine—I don't know what you call it—cloudy stuff, out of it; it is sifted out. This same result then?

A. The same result, yes.

Q. Was produced when you poured the cement mixture, liquid cement mixture, upon the sand-bed?

A. Upon the sand-bed, yes. [117—59]

Q. Would there be any difference in the result if that sand were compacted into a brick?

A. Not that I see, no; of course, when you pick that—after that sets, you take that cement out of there, lift it up after it is set hard and you will

(Testimony of Angus Fleming.)
find, of course, that the sand is all adhered to it, a coating of sand has adhered to it, or rather it adhered to the stone and sets with it, of course,—you understand what I mean?

Q. I think so; I want to be sure the Court understands it.

COURT.—I understand it.

A. Naturally, you take now a piece of putty and throw it in sand; of course, it will pick up the sand with it.

Q. But will it penetrate the sand?

A. Not to amount to anything; you will not notice the penetration.

Q. Are you prepared to say it will penetrate further than the surface particles of the sand-bed?

A. Now, that would amount to the same thing as sand there, if you take and pour it on; when you take and pick that up, you will find there is a coating of sand all over it, but you don't find but very little sand into it. We have—sometimes when we had too much, had a thin facing over, we just poured it into the sand pile, because we didn't want to pour it somewhere else around there, and we would pick it up—the next day we could pick it up and throw it in the trash.

Q. State if you know from your own experience what the effect of applying a coating or a composition of a mixture of cement and water to a concrete body would be?

A. Cement and water. Do you mean making a

(Testimony of Angus Fleming.)

mortar omitting the sand, that is, you will not make a mortar with any sand in? [118—60]

Q. No. A. Just pure cement?

Q. Just pure cement, or it might be mixed with some sand, but substantially a mixture of neat cement and water.

A. Well, yes, to put that onto a body of concrete.

Q. Yes; have you had any experience in that line?

A. Yes, a great deal of it. It amounts to the same thing as plaster on the wall.

Q. State, if you remember, any particular instance in which you have done that?

A. Any particular instance that I have done it?

Q. Any particular instance in which you have done that, applied a mixture of cement and water to a concrete structure.

A. It comes to my mind now, where was quite a number of men working. Soon after I went to work for the city we built the Grand Avenue bridge, the abutments of which was made of rough concrete stacks, which was just concrete poured in there, leaving a rough face and pebbles and such like you could see, and left pretty rough and it had to be plastered over. I said it better have some plaster put on and the foreman said, "I have a couple of handy men there," and he put that handy man there and he couldn't do it; in the first place, he didn't know how to pick up that plasterer's trowel—there is a certain way to use it—he took the trowel this way. Of course, there was quite a number of men working there, and they all laughed at him; finally

(Testimony of Angus Fleming.)

I got down on the platform where he was, and says, "Let me show you," picked up the hawk that he had there, and got some mortar, took it myself and touched it up. The first thing that I done before I done that was to take a brush like a calcimine brush—a wide brush—and a bucket of water, and throw the water all over that wall to dampen it; in other [119—61] words, to get it to adhere. It dries too quick; you can dry cement too quick. Good thing to keep cement all you can from setting. After that was thrown on and the surplus water ran away I took the cement and faced it up. That is one instance right here in Portland, where I was doing it in front of everybody when I come to work for the city. If I had not done this many times before, I would not attempt to go down before all that crowd working there and take a lot of men, and show the men how to do it.

Q. What is the difference between the process described in the claims of the patent and that which you have just described?

Mr. RANKIN.—I don't understand that this witness is in any way qualified as knowing what the process used by Mr. Shope is. He said at one time he read a part of the patent.

COURT.—Don't know whether he knows what the process is.

A. I did read it down here one night. If you will just read me the section of it that states that, I will tell you. Of course, take that as a whole, it seems to me a lot of repetition there.

(Testimony of Angus Fleming.)

Q. Claim 1 reads as follows:

COURT.—The latter part of the claim, applying the cement.

Q. —"Forming the block of suitable material in a semi-dry state, applying water to the face of the block in a sufficient quantity to enter the pores or instices thereof, and adding cement to the water, whereby the cement will enter the pores or interstices with the water." Is there any difference between that process as you understand it and the process which you employed on the Aqueduct Bridge—did you say?

A. Yes, as far as I understand that one I read—I remember reading that one; of course, when you repeat it I remember [120—62] very distinctly about reading it, and it came to my mind something years ago, I suppose thirty-six years ago, we were doing some cement work; we got the work a little bit too wet perhaps; then we took dry cement and sand mixture together, perfectly dry, not semi-dry at all, and sprinkled it over it and *the* trowelled that in because we had a surplus of water.

Q. That you say you did?

A. That I did I guess thirty-six years ago; more than that; I think very near forty years ago.

Cross-examination.

(Questions by Mr. RANKIN.)

Mr. Fleming, take this from me: That you have a block formed from sand and a semi-dry mixture you call it—semi-dry block.

(Testimony of Angus Fleming.)

A. Regular concrete sand and gravel; just make the block first.

Q. Sand and cement. Taking a cement block, usually formed by pressing or tamping in a mold a mixture of sand and cement in damp or semi-dry state? A. Yes.

Q. So that block would be immediately removed from the mold? A. Yes.

Q. Take that block. A. Yes.

Q. Pour on it water, spread over the water cement; would the water serve both to carry the cement into the pores and cause crystalization of the added cement?

Mr. ATKINS.—If your Honor please, witness has not been examined as a technical expert but as a skilled artisan. I object as incompetent.

A. I am quite willing to answer the question. If I understand you right, if you make a block of semi-dry, and immediately go to put the face of it—I would say you have reference to?

COURT.—Cover it with water and sprinkle cement over it, [121—63] will the water carry cement into the block?

A. If you will put the water on first to some extent it will. This will depend entirely on how porous it is, or how large the pores are, of course, as I explained before.

Q. Then the patentee is right is he not if the patentee has claimed that quality?

A. In which? That he can put it on?

Q. Just as I described to you?

(Testimony of Angus Fleming.)

A. But there is no man living can put it in.

Q. Just answer the question yes or no and then qualify it. The patentee is right when he says that? A. No, no, no. I say he can't do it. It depends on how porous it is I say. If he has got naturally all pebbles, which I have seen at times which you could put your finger down in between, naturally the cement and water will penetrate in, but if there is a quantity of sand in it, say a one, two, four mixture, something that way, it will penetrate but a very small distance.

Q. Did you find any such statement as that in the question I gave you?

COURT.—You didn't describe the aggregate at all in your question.

A. No, you are not describing anything exactly.

Q. Well, you know the ordinary semi-dry block of which we make brick?

A. Yes, I know what brick is.

Q. You can't put your fingers down through the pores of that sort of aggregate can you?

A. No.

Q. You take that kind of block and put the water over and spread [122—64] over that cement, will the water take the cement into the pores of your brick? A. A very small distance.

Q. How do you know that?

A. Because I have tried to make experiment tests. I would like you to show me a block, and I suppose you have samples here, where it had penetrated.

(Testimony of Angus Fleming.)

Q. We would be very pleased to do that.

A. I would like to see it.

Q. Do you know the Shope method as described in the patent?

A. Yes, what he has over there, that is that patent there.

Q. Do you know whether all that was read was the Shope method?

A. I suppose so; all that is on that piece there.

Q. Did you ever see brick made according to that method?

A. No, not according to the way—yes, of course when I say— it is not strictly yes, and yet I have, but not brick—I am not a brickmaker, but when it comes to concrete I don't get behind anybody.

Q. I don't understand your answer to the question. You will pardon me; it is possibly my confusion. A. Yes.

Q. Did you ever see brick made according to the Shope method as described in his patent?

A. No. No, because he says there that he uses without pressure and how you can put that on without pressure, I cannot understand.

Witness excused. [123—65]

TESTIMONY OF G. E. STARKS, FOR DEFENDANTS.

G. E. STARKS, a witness called on behalf of the defendants, being first duly sworn, testified as follows:

Direct Examination.

(Questions by Mr. ATKINS.)

You are a resident of Portland, Mr. Starks?

A. Yes, sir.

Q. How long have you lived here?

A. Since 1901.

Q. What has been your occupation during that time?

A. The first seven or eight years I was here I was foreman of a concrete crew, foreman and engineer of a concrete crew.

Q. Since that time what?

A. I have been with the city of Portland as Inspector of Public Works.

Q. In discharge of your duties as Inspector of Public Works, have you had anything to do with concrete construction?

A. Yes, sidewalks, curbs and pavements and all that class of work.

Q. What acquaintance, if any, have you with this patent which is sued upon. I show you copy of it.

A. I have heard it read several times, is all. I have just heard it.

Q. But you understand the meaning of that patent as far as the invention is concerned?

(Testimony of G. E. Starks.)

A. I think I do, sir.

Q. How long have you been personally acquainted with the manufacture of blocks or bricks from a mold in a semi-dry state?

A. Oh, possibly twenty-two or three years.

Q. Have you during that time known of the application of a coating to the brick, consisting of a mixture of water and cement?

Q. Pardon me, but in speaking of a brick you mean a block?

Q. Block, as block is the term used in the patent and refers to any solid structure and so stated in the patent.

A. May I explain that to you? [124—66]

Q. Talk to the Court about it.

A. May I explain that, your Honor?

COURT.—Explain what?

A. He was asking me in regard to my knowledge of dry-facing. To go back thirty years ago in the State of Michigan, my first of that work was done there, and I have followed the building business, and pillars, that is caps for pillars for porches and that class of stuff; I always use the dry facing on the caps of these posts. After I came to Portland, I was running a concrete crew for a contractor here, and he used lamp black in coloring sidewalks, and we always put that on dry. We put our top on the natural color, sprinkled over this lampblack and sand and cement; the lampblack would cut through the sand, or cement, put in proper amount; and it was sprinkled over the top, and we floated it in to

(Testimony of G. E. Starks.)

give color to the sidewalks. I had that experience with the stuff.

Q. How did you apply this facing that you speak of?

A. Take it on the caps for posts or anything of that kind, as a general thing it sets there until the cement is pretty well hardened before you can spread it, you know, and it may be several days or several weeks, but I always grouted it—that is take a neat cement and plastered it over the top, kind of the consistency of paint, rubbed it in, brushed it in, to form a bond between the coating that I put on there and then put on the top coating which is usually you stick a little form on top, and usually it is pretty wet—nine times out of ten you are in a hurry to get through in the evening, and you take some of that dry stuff and put it over the top, float her up—finish up quick to get away.

Q. If upon a block formed of this dry mixture you apply a coating made of a mixture of cement and water what would be the result, [125—67] if you will, from your own experience?

A. You mean as far as penetration is concerned?

Q. Well whatever the result is as you have observed it.

A. You have reference to a block—fresh block made of sand and cement?

Q. I have stated it more broadly than that—block of such a mixture.

A. Well, you take a block in my estimate, that is fresh made of cement, that is sand and cement,

(Testimony of G. E. Starks.)

that is just moderately, so it will hold—so you can hold it up in your hand—just moderately moist, tamp into a form and pour on cement and water, would be very little penetration to it.

Q. What do you mean by little penetration? Be any at all?

A. Well, in sand cement, if it is tamped and tamped perfectly smooth all the penetration there would be is just the little voids around the particles of sand, that is as far as—

Q. The particles of sand where exposed at the surface?

A. That are exposed, if that was put on with pressure; if that were put on with pressure it would have a tendency to float it in.

Q. Would there be a penetration into the pores of the brick upon the application of a liquid cement or semi-liquid coating?

A. If the pores are large enough, yes, sir.

Q. I know, but in the pores existing after tamping a brick?

A. There would be very little penetration. Moisture has a tendency to work up under concrete always, if you will work it and tamp it.

Q. You say the moisture has a tendency to seek the concrete rather than the concrete seek the moisture? A. I don't understand.

Q. I mean to say if you put that on there, you first wet the face of the brick and then put cement on there; which way [126—68] would the moisture go?

(Testimony of G. E. Starks.)

A. Why, the moisture will come up into your cement.

Q. In your experience is there any tendency of the cement to go down into the moisture?

A. I don't see what you mean.

Q. Speaking of your experience now, when you put cement on a moist surface what is the result?

A. The result is it just sets right over the top of the moisture there if it isn't rubbed in—worked in.

Q. What do you mean by working in? Do you mean to say that by pressure you can force that cement into the pores, or do you mean that you can stir up the surface of the green block?

A. I mean if you will take cement and water and mix it up to proper consistency, that you can work it into these pores but you could put water on that surface and put your dry cement around over your water and your water will not carry that cement down into the pores.

Q. Would the result differ or not if you agitated the water and cement on top?

A. Yes, it would be a little different.

Q. What would be the difference in the result?

A. It really would have a tendency to— the cement would have a tendency to work down into all the little open pores that were on top if you work it hard enough.

Q. I am speaking about agitation now as distinguished from pressure. If you merely stir

(Testimony of G. E. Starks.)

that up so as to make a mixture would there be any difference in the result?

A. The green surface? If you stir it up you are stirring up the fresh concrete, the fresh material that is in there and just mixing it all together.

Q. What do you mean by fresh material that is in there? [127—69]

A. For instance, if you make a block and put your water and cement on top of that block, and we will say you go to agitating it with a brush, you will brush up that fresh material that is in the bottom; your cement will work up and mix all through.

Q. You would embody some of the material of the brick into the surface coating, would you?

A. Yes, that is the idea.

Q. What would be the effect if instead of a brush you used a float for mixing the surface coating, or agitating the surface coating, if you please?

A. You can put it on carefully with a float, the same as you can with a trowel, but if you go at it and agitate it thoroughly, you will gouge up your concrete the same as you would with a brush.

Q. How long have you used a float for applying a coating composed of cement and water to a concrete surface such as is described in this patent?

A. My first experience in that was possibly thirty years ago.

Cross-examination.

(Questions by Mr. RANKIN.)

Q. Mr. Sparks, are you familiar with pavement, concrete pavement?

(Testimony of G. E. Starks.)

A. Quite familiar, yes, sir.

Q. Have you had experience in that line?

A. Yes, I am on that most every day.

Q. Are you familiar with the Hassam form of laying pavement?

A. The old Hassam they put in here?

Q. Yes. A. Yes, sir.

Q. After the crushed rock was put upon the road, what was then done under the Hassam method?

A. There were applications of sand and cement and water that were [128—70] poured onto it, and was all slushed through it.

Mr. ATKINS.—The examination as to certain kind of pavement with no evidence before the Court as to what that term means is not calculated to be very instructive.

COURT.—I suppose counsel assumes that most people know what Hassam pavement is.

Mr. ATKINS.—Well he may do so, I suppose; it has been the subject of much litigation.

Mr. RANKIN.—He has already said he knows what it is.

Q. Did the cement and sand penetrate into the voids in that pavement?

A. Those rocks, yes, sir.

Q. Now on the same principal would you say it would pentrate into these bricks?

A. No, sir, a different thing altogether.

Q. You understand me, don't you, that the voids or pores in the pavement would be much larger than in the brick? A. That is the idea.

(Testimony of G. E. Starks.)

Q. And consequently much smaller in the brick than in the pavement? A. Yes, sir.

Q. With inverse reasoning. Wouldn't there be some penetration even in the brick?

A. Well, there is some little penetration as far as the—in these particles that stand up on top there, it will run down around the sand, but it will not penetrate that brick.

Q. What would you say would be the distance in penetration?

A. I couldn't give you any figures on that.

Q. Would it be approximately three-eighths of an inch? A. Three-eighths of an inch?

Q. Yes. A. No, sir.

Q. You are certain of that? A. Absolutely.

Q. Did you ever make any experiments?

[129—71]

A. I never have; not of that—not of brick.

Q. Let me, in order to clarify my question, show you Plaintiff's Exhibit 7, which represents certain brick in a machine. Did you ever have any personal experience with making brick? A. No.

Q. As disclosed in that photograph?

A. No, sir, I have not.

Q. Upon what do you base your statement then, please, that there would be no penetration in the case of a brick of that nature raw—green, to which is applied water and cement?

A. What do I base it? I will take your Hassam for instance: When we pour the Hassam on the street to keep the water out of the sewers, where

(Testimony of G. E. Starks.)

these inlets are in we throw a sack over them, a gunny-sack, and throw a shovelful of sand over the top of that gunny-sack, make just a little bank of sand along the side; if we don't do that we fill up our sewers, fill the pipes with concrete, with cement, hardening in there and stopping them up, but after you get done pouring that street, this sand that was in there, there was a coating of cement over the outside of it, but you pick it up and there was not a bit of cement went into the sewer; never penetrates that sand.

Q. Now, you are basing the statement that water and cement will not penetrate into a brick as shown in this exhibit upon that experience that you have had? A. Yes, to any particular depth.

Q. Is there any other experience that you have had upon which you base that conclusion?

A. Why nothing that I can think of right at the present time.

Q. As I understood your direct testimony, Mr. Sparks, in answer to Mr. Atkins' question you said that there would be some penetration?

A. What I mean by some penetration was the sand—as I understand we were speaking of mixture of sand and cement that is put [130—72] in the form, and in the sand that was sticking up, these particles of sand, why there would be penetration just to fill these little voids around the sand there.

Q. Then the penetration would not be any deeper

(Testimony of G. E. Starks.)

than the sand particles on the surface of that brick?

A. If it was put in with water and the stuff sprinkled on it, I said the water would not carry it in.

Q. It would not carry it in any,—let me understand the distance to which it would carry it in. It would not carry it in any further than the full diameter of the sand particles on the face of that brick?

A. Without they was voids down further—those voids in there, don't you see? That is all.

Q. If there were voids underneath would the water continue to take the cement down in the lower voids?

A. If they were large enough. That is if the voids were large enough. I don't believe you would get them large enough on sand.

Q. Or if the cement were small enough?

A. The cement is certainly fine enough.

Q. What is the degree of fineness in a block which would prevent—where the water would not take the cement into the voids?

A. Well, I couldn't give you any figures on the fineness of these voids that it wouldn't carry into. I am not an expert on that stuff at all.

COURT.—If you had one of those bricks without any coating—before the coating was put on, just as it was made in the machine and should pour a cup of water on it, what proportion of the water would go down in the brick?

(Testimony of G. E. Starks.)

A. Well, your Honor, I have taken lots of bricks and it would hold whole cups of water but not of these cement brick. The cement brick is something that I— [131—73]

COURT.—I refer to these bricks we are talking about now. I don't mean clay brick.

A. The consequence would be, you pour a cup of water on that brick, your Honor, and when they take their form away the brick would fall down.

COURT.—I don't understand what you mean.

A. If I understand the way they make these bricks they are all in little forms and if you pour a cup of water before that form was released on to that material that is in there, when you took your form away the brick would fall down.

COURT.—Suppose you left the form there, don't take the form away; just pour the water on the brick in the form?

A. As moist as that is the water will go clear down, clear through it.

COURT.—If that water contains in solution cement, it would take some of the cement with it, wouldn't it?

A. The reason I form that conclusion as I said is on account of the drainage, when you are putting in Hassam pavement and pour the cement and water and sand, this last coating that goes into it to fill in the pores. Now where it runs down to fill up the catch basins, to keep it out of the catch basins, we put some sand there, and where in one case that sand is full of cement—the water went through but the sand don't. That is the way we keep it out of the sewers.

(Testimony of G. E. Starks.)

COURT.—The water wouldn't carry the cement in solution?

A. No, that is the reason I say it don't take it. In fact, I don't know just how they will take it in there but very little.

Q. Have you had any experience with cement brick?

A. I don't know anything about cement brick.

Witness excused. [132—74]

TESTIMONY OF ROY WARD, FOR DEFENDANTS.

ROY WARD, one of the defendants called in his own behalf, being first duly sworn, testified as follows:

Direct Examination.

(Questions by Mr. ATKINS.)

You are one of the defendants in this case, Mr. Ward? A. I am.

Q. How long have you lived in Portland?

A. Since 1907.

Q. What has been your business during that time?

A. Well, following cement work, except I went to work in the sheriff's office in—when was it Hurlburt went in—'15—went in in '15. I worked '15 and '16 for him and I was with the O. W. R. N. in '17; '18 and part of '19 for the O. W. R. N.

Q. You say you have been from the time you came here a worker in cement construction?

A. I have.

Q. How long have you been engaged in such work?

(Testimony of Roy Ward.)

A. I went to work at construction work when about nine years old, carrying mortar.

Q. How old are you now?

A. Will be forty the 22d of June.

Q. You have been making brick in Portland?

A. Yes.

Q. How long?

A. We started last year about the first of the year, getting our building ready.

Q. Did you make faced brick? A. We did.

Q. Are you making them now? A. I am not.

Q. Why did you cease making faced brick?

A. An injunction issued by Judge Wolverton.

Q. How did you make these faced brick?

A. First the sand and cement was put in a mixer and mixed, and put in a machine and tamped. The top of it was raked [133—75] off by a hopper that slides over the face of the plates, and on the side had a table like a plasterer's mortar board with neat cement on that, or sand and cement, whatever I want, and I mix that up first; mix that up first before I make any brick for this neat cement, especially if warm weather—let that stand or set for a few minutes, and break the initial set, while you are getting your concrete ready—sort of break the initial set, that is the first set. When we make our brick we mix this up, well mix—use two trowels, and break it up; use one in place of the hopper the plasterer uses; plaster that on top; if a smooth brick, I quit there; makes it smooth, absolutely smooth brick; that is all done. The ends of this machine lets down with two little levers. Hold one trowel on the top, use it as a

(Testimony of Roy Ward.)

straight edge and plaster on the ends of these bricks which stick in the front of the machine about one-sixteenth of an inch, which allows us to place the plaster; they stick in the face of the machine about one-sixteenth of an inch so as to give us something to work on; stipple—have my brush—keep my brush in a bucket of water. I have tried practically all the brushes I could find; I find the best is a common fifteen-cent store whisk-broom; keep it in a bucket of water, and keep it well soaked so the ends of it is not sharp and won't dig up your work, and make a rough finish, although middling smooth on account when clear no pockets or holes have dried in it; makes a nicer looking job to my mind than rough brick, by keeping the brush soaked. Then take out and set away to cool.

Q. What sort of a trowel do you use in the manufacture of your brick for applying the coating mixture?

A. Use a common Marshalltown trowel—common plasterer's [134—76] trowel.

Q. What is that made of—metal?

A. Metal—steel.

Q. Why do you use metal?

A. It slides; slides over; presses; presses right in. Trowels it right in.

Q. Why do you not use a wooden float for instance?

A. Well, I have never tried wooden float. Where I learned to handle a trowel we didn't use a float on that kind of stuff. Of course was mostly blocks there.

(Testimony of Roy Ward.)

Q. You have seen the wooden floats used in the Shope machine? A. I did.

Q. Shope Brick Company? A. I did.

Q. What difference in the operation of that float and your metal trowel is there, if any?

A. Well, a wooden float has more of a suction; wooden float, it sucks, pulls the moisture right up and dries it all out and stirs the sand up that is down at the root of this deep cement, pulls it right up; rolls it up. Where the trowel is smooth and you put it on there, you slide right over just the same as smoothing that wall.

Q. In using a metal trowel, do you agitate the surface coating?

A. No, not with metal trowel you don't agitate; it smooths it.

Q. Is it your purpose in applying the surface coating according to your method to stir up the coating or to agitate it in any way?

A. No, I try to keep away from agitating.

Q. Why?

A. Well, I think I can make brick faster, and I think it makes a neater job, eliminates work.

Q. What would be the result if you did stir it up according to your experience?

A. Well, you would roll up your sand in your top more. [135—77]

Q. How long have you been practicing the method which you are operating under at present in your plant, or were up to the time the injunction issued?

A. You mean on the brick only?

Q. I mean the patent reads: "The word block is here used generically including a brick, tile or

(Testimony of Roy Ward.)

other mass of any shape or size as well as a block technically so called." Within that?

A. Always used a trowel.

Q. How is that?

A. I always used a trowel. Never used a float applying facing at all.

Q. How long have you used a trowel in applying surface coating to such a body?

A. Well, ever since we have been making face brick here, and done it in Iowa when working for Grindstaff in their block plant, although their output of blocks was very small, mostly silo staves.

Q. What is the length of that period you just referred to?

A. Well, we got that little machine I imagine probably in May of last year, so the first brick we made in Oregon, or used any of that kind of stuff on brick—

Q. You misunderstand my question. I am asking you how long you have used this method of applying coating to a cement block?

A. Well, I worked in that plant in 1905 and 1906 —part of '04, '05 and '06, except in the winter there was nothing doing.

Q. What do you refer to by that plant?

A. Plant in Iowa, where my home was.

Q. You are doing nothing different from what you did then? A. Absolutely not.

Q. Have you ever made brick or cement blocks otherwise than you showed the representatives of the plaintiff on May 14, of this year?

A. No, sir. [136—78]

Q. Always the same?

(Testimony of Roy Ward.)

A. Always made them the same.

Q. And that is the same way you have done ever since 1904 you say?

A. Yes, when I was working at that plant making blocks and silo staves.

Q. You have seen the operation of the so-called Shope method in their plant? A. I have.

Q. That was on the same date, May 14th?

A. That was the same day.

Q. What difference if any did you discover between the process practiced there and that which you have used for the last twenty years or so?

A. Well, outside of making bricks; we never use that making blocks, that is building blocks and that kind of stuff, but for use on walls and irrigating ditches, and anywhere that stands where the concrete will run off, wet facing will run off; I use that same method.

Q. When did you first visit the Shope Brick Company plant or works?

A. The first time I was ever in that Shope plant was the day we were all in there together. That is the first time.

Q. You have heard the witnesses testify that you were there a year and a half ago? A. I did.

Q. Do you deny it? A. I do.

Q. Is there any difference between your appearance now and the time when you were said to have been there?

A. At the time I was said to be there I weighed about 295 pounds.

Q. What do you weigh now?

(Testimony of Roy Ward.)

A. About two hundred; have got about eight inches of belt [137—79] to spare.

Q. Have you had any experience, Mr. Ward, in determining whether a mixture of cement and water applied to a block made of a semi-dry mixture of cement and sand—what the result of applying a mixture of cement and water to a semi-dry brick is?

A. I never applied it to a semi-dry block.

Q. What?

A. Never applied it to them two articles, block and brick. I have to walls, bridge caps, porch steps and that kind of stuff.

Q. While you were making brick you applied it, didn't you?

A. Not in dry mix, no; we used our stuff wet mixed.

Q. Your brick is not a semi-dry brick?

A. It is a semi-dry brick, yes, but coating, the cement is mixed on a board before it is put on the brick; never apply dry cement and water to the brick. I don't know what the result will be there, but I know on steps, porch caps, and that kind of stuff.

Q. On steps and porch caps, what is the result?

A. Sprinkle well with water, then sift cement on it and get on with a float and float it down and trowel it so you get through quicker, especially in cold weather, when slow set or a steep wall.

Q. Have you observed whether penetration of the coating mixture into the body of the object?

A. Not unless you might float it in.

Q. If you floated it in, what would be the result?

(Testimony of Roy Ward.)

A. You would roll it up; roll up the concrete underneath in your top.

Q. The effect would be to make a less rich mixture of the cement than that which was originally applied? [138—80]

A. It would. You stir the sand up in it.

Cross-examination.

(Questions by Mr. RANKIN.)

Mr. Ward, you said you used a fifteen cent whisk broom to stipple with? A. Yes, sir.

Q. Is that brush wet or dry?

A. We keep it in a bucket of water all the time.

Q. And what was the purpose of that?

A. If that brush gets dried out the bristles is real sharp and stiff; it bunches it up where if soft will kind of fuzz out and acts more like a sponge, I mean for the softness of it. You will have to trim them up once in a while—will be all feathered up.

Q. The reason you keep the brush in a bucket of water is to keep the brush soft?

A. You have to keep the brush moist all the time, wet when you put it in there, or it will tear off the face.

Q. And that is the only reason?

A. That is the only reason I see, unless awful hot weather and have to use water to keep from setting too fast; then throw water on there.

Q. Is there any other reason you keep water on the brush? A. I don't know as there is.

Q. If that were the only reason why would you go back to the bucket to get additional water?

(Testimony of Roy Ward.)

A. The other day when you were out there I called attention to the brush hanging on the post for some time, and was awful dry—just like a needle.

Q. That is not the usual way?

A. Lays in the water all the time; unless awful hot never use water only what is naturally in the brush. [139—81]

Q. Wait until I finish the question please. This way you illustrated to us the other day was not the usual way you make brick?

A. Only that the brush—I told you the other day that the brush was awful dry.

Q. Then I understand that there was a difference between the way in which you make brick as you showed us the other day, and ordinarily?

A. I dipped the brush in water three or four times, to see if it wouldn't soak up.

Q. And that is different from what you usually do? A. Sometimes we never touch it again.

Mr. ATKINS.—If your Honor please, he says he intends to keep the brush wet.

COURT.—I understand what he means, yes.

Q. Maybe I am mistaken, but it seems to me it is of importance. Just this question: Which would carry the most water, a brush that was constantly wet or a dry brush?

A. Well, the constantly wet brush will carry the most water when it gets all fuzzed out.

Q. You speak of agitation. Do you agitate?

A. With the trowel; no, sir.

Q. Can you agitate with a trowel?

(Testimony of Roy Ward.)

A. I doubt it; that is the flat surface. Can kind of stir it this way.

Q. No. I mean flat surface.

A. No, that doesn't agitate.

Q. You say you cannot agitate with a trowel?

A. No, I didn't say.

Q. Can you agitate with a float?

A. Oh, yes, that is what you have. [140—82]

Q. What is the difference between that and the same motion with a trowel?

A. Well, float there is some suction; big suction to a wooden float.

Q. Has more suction? A. Yes, the wood has.

Q. Suppose your float was lined or faced with metal, would there be any difference?

A. Would act the same as a trowel; would slide over the top.

Q. Do you know if Mr. Shope's floats have metal facing? A. I didn't look at them.

Q. You don't know whether they do or not?

A. I didn't look at them.

Q. They may have metal facing for all you know.

COURT.—He says he don't know—didn't look at them. How can he know any more about them.

Q. How many faced concrete brick have you made?

A. Oh, I imagine somewhere around five thousand, this time we got stopped; that is up to the time the injunction was out.

Witness excused. [141—83]

TESTIMONY OF OTTO PETERSON, FOR DEFENDANTS.

OTTO PETERSON, one of the defendants, called in his own behalf, being first duly sworn, testified as follows:

Direct Examination.

(Questions by Mr. ATKINS.)

You are the other of the two defendants in this case? A. Yes, sir.

Q. How long have you lived in Portland?

A. Since 1907.

Q. How long have you been engaged in cement construction work?

A. Well, I haven't—you mean out in our plant? Since last year.

Q. No, altogether.

A. Oh, altogether. I am not very much of a cement man. I have been with it off and on for, oh, I should judge somewhere along 15 or 16 years; not steady; just off and on.

Q. How did you make faced brick in your plant before the injunction was issued in this case?

A. Why, we tamped concrete into the molds—

Q. How do you make it?

A. Put it on with a trowel. I never made them. Mr. Ward is the man that always makes that. Takes one trowel and puts it on with that and finished the top, smooth finish, and finishes it with a fifteen cent broom, I think, anyway finishes the top, lets the door of his mold down, and his long trowel on the edge in this manner, smears it on the same as plaster on the wall, or any other part.

(Testimony of Otto Peterson.)

Q. Did you ever make faced brick in any other way than that out in the plant?

A. No, we haven't; the only way we ever made it.

Q. How long has that method of manufacture been known to you in [142—84] making articles?

A. I have seen it done 25 years ago or more. Twenty-five years ago, anyhow; 1897, that I remember of.

Q. The method which you first saw, say 25 years ago, is the same that you practiced?

A. Identically the same.

Q. Down at your factory?

A. Identically the same thing.

Q. Identically the same. A. Same thing.

Q. You were at the Shope Brick Company works on May 14 of this year? A. Yes, sir.

Q. How many times had you visited those works before that time? A. The Shope Brick Company?

Q. Yes.

A. Well, we bought our truck on the 12th day of March, and somewhere along the last part of March or first of April was the first time I ever entered the Shope Brick Company in any way. Never been near the place outside of going by it with the machine.

Q. Between that time and May 14 of this year, did you visit it frequently?

A. Well, I have been in there after bricks since the injunction.

Q. But before the injunction.

(Testimony of Otto Peterson.)

A. No, I never was in there before; never was in there before.

Q. Is it true that you were out there before the injunction was issued, measuring tiles?

A. No, sir; I never was near the place.

Q. Positively deny that? A. Yes, sir.

Cross-examination.

(Questions by Mr. RANKIN.)

Where were you, Mr. Peterson, 25 years [143—85] ago when you saw this art practiced

A. Twenty-five years ago was in St. Paul, Nebraska.

Q. Were you working there?

A. I was working there, yes, sir.

Q. Were you working in cement brick mills?

A. No, sir; working for a man; worked for him four years that ran a brick yard. Was a bricklayer. Was a cement man; done everything. I used to run the yard. Was a sort of foreman when he was not on the job.

Q. What were you doing there?

A. Manufacturing clay brick.

Q. You were manufacturing clay brick?

A. Yes, sir.

Q. Was that cement brick?

A. No cement brick back there at that time.

Q. How long ago had you known of manufacture of cement brick?

A. I don't recall the time, but has been some time. I heard about it for some time.

(Testimony of Otto Peterson.)

Q. Did you ever know it before you met Mr. Ward?

A. Oh, yes, I knew about cement brick before.

Q. Did you ever see the bricks before you met Mr. Ward?

A. No, I never worked with cement business very much myself. I am not an expert man in cement work.

Q. You don't manufacture the brick yourself?

A. No, I am not—I am not handy enough with the trowel.

Witness excused. [144—86]

Mr. ATKINS.—If your Honor please, a number of patents showing the prior art have been set up in the answer, and we wish to introduce those in evidence and have them marked as defendants' exhibits.

Patents received in evidence and marked as follows:

Hubbell Patent No. 115,475, May 30, 1871—Defendants' Exhibit "D."

Richardson Patent No. 461,890, Oct. 27, 1891—Defendants' Exhibit "E."

Goode Patent No. 518,239, April 17, 1894—Defendants' Exhibit "F."

Federici Patent No. 527,416, Oct. 16, 1894—Defendants' Exhibit "G."

Haddock Patent No. 531,842, January 1, 1895—Defendants' Exhibit "H."

Jongbluth Patent No. 587,484, August 3, 1897—Defendants' Exhibit "I."

Stevens Patent No. 624,563, May 9, 1899—Defendants' Exhibit "A" (p. 15).

Emerson Patent No. 692,644, Feb. 4, 1902—Defendants' Exhibit "K."

Davies Patent No. 703,644, July 1, 1902—Defendants' Exhibit "L."

Jaques Patent No. 723,281, March 24, 1903—Defendants' Exhibit "M."

Jaques Patent No. 748,611, Jan. 5, 1904—Defendants' Exhibit "N."

Brownson Patent No. 777,073, Dec. 13, 1904—Defendants' Exhibit "O."

Cox Patent No. 814,358, March 6, 1906—Defendants' Exhibit "P."

Porten Patent No. 818,286, April 17, 1906—Defendants' Exhibit "Q."

Bartlett Patent No. 829,249, Aug. 21, 1906—Defendants' Exhibit "R."

Brown Patent No. 833,952, Oct. 23, 1906—Defendants' Exhibit "S."

McClenahan Patent No. 850,670, Apr. 16, 1907—Defendants' Exhibit "T."

Henderson Patent No. 886,124, April 28, 1908—Defendants' Exhibit "U."

Thomas Patent No. 958,194, May 17, 1919—Defendants' Exhibit "V."

Malette Patent No. 751,089, Feb. 2, 1904—Defendants' Exhibit "W."

Mr. ATKINS.—If your honor please, one of the patents set up in the answer is patent issued May 9, 1899, to Charles W. Stevens for a process to make artificial stone, this process is one of casting cement

blocks; it is distinguished to [145—87] that extent from the making of a semi-dry cement brick. This patent is not offered in anticipation of the making of cement bricks, whether they be faced or otherwise, but it describes in Claim 1 in brief language, a process which negatives the possibility of cement mixed with water in a liquid state entering a sand mold upon which it is formed. The first claim of the patent reads: "The process of forming artificial stone consisting in molding the stone compound while in a plastic or semi-liquid state in or on a mold formed of relatively dry sand and then allow the mass to set until the sand absorbs the surplus moisture from the compound, thereby converting the latter to a solid or nonliquid form, substantially as and for the purpose set forth." Now in forming that cast stone the inventor made a mold of sand, that is to say, he used a container and in the bottom of that tamped a mold which gave form to the block cast upon it. By the aid of that method he was able to form in most intricate design.

Mr. RANKIN.—I don't wish to interrupt, but counsel has not qualified as an expert in this case. This is either argument or testimony, one or the other.

Mr. ATKINS.—It is neither. It is introduction to what I am about to say. The patent is in evidence for itself.

Mr. RANKIN.—Then what is the use defining it if it is in evidence

COURT.—What is the use of arguing now?

Mr. ATKINS.—If I may be permitted, I will state

why I am offering this. This patent has been the subject of extensive litigation. The patent was upheld by the Circuit Court of Appeals of the First Circuit, and the principle upon which the patent rests is that the mold will form a clear demarcation [146—88] between the cement and the water which is used in liquefaction. It has sustained the case, but I am advised by letter from the Clerk of the Court of Appeals that application was made for certiorari to the United States Supreme Court. I have not been able to find any reported account of that, but have a letter from the clerk. But at any rate the patent has been sustained and the theory has been upheld as fully established. The record is a somewhat extensive one, and I wrote for a certified copy of the record in that case, and intended to file it as part of the record in this case, in order that your Honor may see that it has been, as one might say, authoritatively established that a mixture of water and cement in a liquid state poured upon a tamped mold of sand will not penetrate the sand, but that it will assume the form of a casting that has fine lines as if the cement were metal and had been poured into a mold in which the metal is set. Now, I cannot file that certified copy of the record because it is loaned, but the certificate is attached to it, and I shall be glad to read perhaps one or two extracts from that for the information of the Court. The Court may find in the reported case much that appears here, but this I think will apprise the Court of a fact, established by extensive litigation in which both parties were represented by eminent counsel and which extended

over a number of years, and established the fact that a mixture of cement and water upon a sand mold will produce a separation of the water from the cement and will not permit penetration of the cement into the sand, which is the basis upon which the superiority of this patent in suit is sought to be recognized.

COURT.—When it comes to the argument, you may.

Mr. ATKINS.—May I read it in as part of the record in the case? [147—89]

COURT.—I don't think so. I don't think the decisions of the Courts, while they might be persuasive as an argument, would be any evidence.

Mr. ATKINS.—I recognize it is not evidence and am not making such an offer as evidence before the Court except in reference to the existence of a physical law. [148—90]

TESTIMONY OF RALPH K. STRONG, FOR DEFENDANTS.

RALPH K. STRONG, a witness called on behalf of the defendants, being first duly sworn, testified as follows.

Direct Examination.

(Questions by Mr. ATKINS.)

Give your age, residence and occupation.

A. I am 41 years old; professor of chemistry at Reed College.

Q. What qualifications have you in the way of

(Testimony of Ralph K. Strong.)

study that entitle you to be here as a chemical expert in this case?

A. I have studied and taught the subject of chemistry since graduation.

Mr. RANKIN.—Mr. Strong, it is a pleasure to admit your qualifications.

Mr. ATKINS.—That goes without saying, so we may proceed.

Q. You have made a study of the patent sued upon in this case? A. I have.

Q. Do you understand the invention as described therein?

A. I understand, I believe, the descriptions.

Q. I hand you a copy of Plaintiff's Exhibit 1, and ask you to read Claim 1 thereof, and explain it to me as you understand it.

A. The claim states in my opinion that cement due to the water on the original semi-dry brick passes into the pores of the brick with the water. That is the description, in my opinion.

Q. What difference, if any, is there between the invention as defined in Claim 2 and that defined in Claim 1?

A. The difference is in the last part, "and adding cement to the water, whereby the cement will enter the pores or interstices with the water."—Claim 1. "Then spreading cement upon the water and agitating the mixture to carry the cement into the interstices of the block to the required depth" in Claim [149—91] 2.

Q. Have you made any experiments or investiga-

(Testimony of Ralph K. Strong.)

tions to determine whether, under the conditions named in the patent the water of the mixure added to the semi-dry blocks will enter the pores of the block? A. I have.

Q. What is the result of your investigation?

A. I took the extreme case I could imagine. I took sand itself, which offered a maximum of voids, and placed it in the cement, which offered the maximum of penetrating ability. The sand was covered with water, and the cement added without mixing, was poured on to the sand, and allowed to set, and then the vessel in which this was contained was broken and the surface contact between the sand and the cement very carefully examined. There was no penetration, as far as I was able to determine, of the cement into the sand. Much to my surprise, there were in some cases free surfaces of cement exposed. Of course the cement had adhered to the upper particles of sand; that goes without saying; there was perfect contact there. But as far as it was possible to observe, there was no penetration of the cement into the sand layer.

Q. Did you make any further experiments to determine whether if cement were added to the mixture of the dry sand in the semi-dry state, there would be any difference in the result?

A. I added to the sand in the same condition dry cement instead of neat cement and as far as it was possible to observe, there was no difference. The dry cement had extracted water from the sand and set, of course.

(Testimony of Ralph K. Strong.)

Q. In your opinion, will the application of a mixture of water and cement applied to the face of a block result as stated in Claim 1?

A. It will not. [150—92]

Q. Does agitation affect that result?

A. It certainly does.

Q. To what extent?

A. As far as it is agitated. It is like a small boy in a mud puddle. It seems to me rather a homely example, but I can't think of anything that would illustrate the point better. The further he digs into the dirt underneath the water he is mixing, he more thorough will be the mixing. In this case it seems to me the more agitation of the upper surface, the more of the block material will be intermingled with the cement.

Q. Will there be any difference in penetration as a result of the agitation? A. None.

Q. What do you understand by the term "penetration" of the pores of the block, as the language of the patent reads?

A. Penetration, in my opinion, would be the cement passing into voids, using that in the absolutely general sense, covering all voids, measurable or immeasurable, in which the void was in diameter less than the diameter of the cement particle. It is perfectly apparent that any void that is less in diameter than the cement particle, will hold the cement particle there, it being a solid just the same as every filter we work with operates.

Q. What do you understand to be the reason for

(Testimony of Ralph K. Strong.)

the lack of penetration of the cement mixture into the block?

A. There isn't a void large enough to take care of the cement particles.

Q. What is the nature of the mixture of cement and water chemically considered?

A. Chemically considered, it is a suspension, solid cement [151—93] and liquid water.

Q. What do you mean?

A. I use suspension in the technical sense.

Q. Is it solution?

A. It is not solution. Cement is insoluble in water.

Q. What is the distinction of a solution from a mixture?

A. A mixture would cover any two substances intermingled, no matter how many phases. A solution is one phase; every part, every section of the solution is homogeneous. It is a homogeneous mixture, as we ordinarily begin to define it.

Q. Is there homogeneity in the mixture as distinguished from a solution?

A. No, indeed, it is not necessary, although a solution is a mixture. Homogeneity is not a characteristic of a mixture.

Q. What is the effect of the application of water to a particle of cement considered as a single object of thought?

A. There has been great difference of opinion as to the mechanism of the reaction. There is a crystalline theory of setting, and there is the colloidal

(Testimony of Ralph K. Strong.)

theory of setting, and all conversions and variations that have to do with those two main theories. I might say that the colloidal theory is a somewhat recent one, and if I may quote from Desch there verbatim, or have it covered in the record, it seems to me it might be helpful in explaining the mechanism. Desch on the Chemistry and Testing of Cement.

Mr. RANKIN.—The date of that, please.

A. 1911.

Mr. RANKIN.—What edition, or is there only the one edition?

A. It is not so stated. "The action of lime on silica in the presence of water leads to the formation of a gelatinous mass, in which both lime and silica are present."

Mr. RANKIN.—Since the date of the book is 1911, and the patent was issued in February, 1911, it is certainly not [152—94] a publication that could precede within two years the issue of this patent.

Mr. ATKINS.—It is not offered as a publication.

Mr. RANKIN.—I think that is correct, and I withdraw the objection.

A. (Continuing.) In which both lime and silica are present, but for which it is impossible to obtain a definite formula, the composition varying with the conditions of the experiment. A hydrated calcium metasilicate, containing an uncertain amount of water, has been obtained by several investigators, but the formation of crystalline substances of this kind is always a secondary change, the original precipitate being invariably gelatinous." * * *

(Testimony of Ralph K. Strong.)

"Since the absorption of water by a colloidal mass to form a gel is accompanied by a great increase in the volume of the mass, as is familiarly seen in the swelling of gelatine or starch grains, it has been questioned whether a colloid theory is applicable to cements, which are known not to increase largely in volume during setting. The objection is really based on a misunderstanding, whilst the individual particles of cement become larger, the total volume of cement plus water diminishes during the absorption as is always the case when colloidal gels swell by absorption of water."

Q. Who is this writer from whom you have quoted?

A. The authority of that theory is Michaelis, propounded in 1893, according to Desch.

Q. Is the theory of the colloidal formation of cement by application of water correct in your opinion or not?

A. It is the best in my opinion offered, and in support of my opinion I would state this: That cement which has been set can be reground, and can then be set again. It can be reground [153—95] and set again. And the explanation is that the action is superficial on the outside of each particle. And when that superficial layer, this colloidal gel, which does not demand it be in liquid or plastic state—the gel may be the original gel—has been removed, there is still cement available for a new set.

Q. What would be the effect in respect to pene-

(Testimony of Ralph K. Strong.)

tration of a block of cement in suspension in water in consequence of this colloidal theory?

A. Well, just as soon as the setting begun, the particles of cement will go in not as far as it would when it was fresh.

Q. The formation of the colloid would then act as an additional means of excluding the intrusion of the cement into the pores. Is that correct?

A. Exactly.

Q. And in your opinion without the colloidal formation the cement would not penetrate the pores?

A. With or without it would not penetrate through a pore greater in diameter than I have defined previously.

Q. Is it correctly stated in the patent that the water will lead the cement downward into the pores? A. In my opinion it will not.

Q. Why do you so state?

A. In the process of filtering it is well known that a filter medium may be used to separate solid particles from suspension which are smaller even than the voids. That is, it would go through the voids. To illustrate: Now, a common practice is to filter and let the first part go through clouded and then put it back in the original container, and keep on and very shortly after you have carried that on, a liquid comes through clear. It seems as if the particles of solid which are to be [154—96] taken up pile up and interfere with each other on the filter, and themselves act as a filtering medium.

(Testimony of Ralph K. Strong.)

Q. If I understand you correctly then the block, the cement block of the patent acts as a filter to the cement in suspension in the liquid. Is that correct?

A. In so far as there is a flow of water through the brick, or into the brick, it acts as a filter.

Q. It allows the passage of water and interrupts the passage of cement into the pores? A. Yes.

Q. You saw the operation of the so-called Shope method at the Shope plant on May 14 of this year?

A. I visited the Shope plant, and I believe that was the day.

Q. In your opinion, was there any exception to the theory which you have expressed that the block acts as a filter to the cement in suspension in water?

A. I had no difficulty in verifying the theory in my opinion on the examination of that Shope brick.

Q. What effects the facing of the Shope brick? Is it adhesion, or is it in consequence of the infiltration of the cement mixture into the block?

A. Do I understand the question to be the adhesion of the surface and body of the brick?

Q. The adhesion of the coating to the block.

A. There is a continuous layer of cement, continuous not absolutely, but you can follow the cement around by the particles of sand which are in the upper layer. The cement of the upper part adjoins the cement of the lower, intermingled by the aggregate.

(Testimony of Ralph K. Strong.)

Q. Do you recognize that brick, that particular brick? A. I believe I do. [155—97]

Q. What is it?

A. It is a brick made, I should judge by the cross-section here by the Peterson Ward process.

Q. In the Shope brick is there a difference in thickness of the layers of the different faces?

A. There is. The outer face may be traced further down into the brick.

COURT.—In the Shope brick, you mean?

A. Yes, in the Shope brick.

Q. How do you account for that?

A. Account for that by mixing which the Shope people do on the block.

Q. What do you mean by mixing?

A. Agitation.

Q. Is it the mixture that increases the apparent thickness there?

A. It is stirring up of the block and of the cement which is put on for a finish.

Q. It is not then evidence of penetration?

A. Absolutely not, in my opinion.

Q. That increased thickness is caused from agitation? A. Intermingling.

Q. From intermingling of the loose sand from the green brick? A. Yes.

Q. With the cement mixture of the coating?

A. I believe that is it.

Q. What led you to that opinion, as far as your observation went?

A. I don't think I can answer that.

(Testimony of Ralph K. Strong.)

Q. You saw the Shope brick manufactured?

A. I did.

Q. You say that you think that the difference in the thickness is the result of the mixing up of the sand into the cement coating? [156—98]

A. I do.

Q. Now, how do you arrive at that conclusion from what you saw in the operation?

A. I saw them operating with considerable vigor.

Q. In what way?

A. I think that I would rather do it this way, if the Court is agreeable. With two bricks certified to be Ward & Peterson and Shope, I could show that if I had the two fractures to compare them, as I have no marks of identification on any of the bricks.

Q. Then you can't identify that?

A. I was careful to state that.

Q. Yes, I observed that.

COURT.—I think we should identify the bricks if they are to be used.

A. This can best be done by the men themselves.

COURT.—By the people who made them?

Mr. ATKINS.—Can we call Mr. Ward to identify the brick?

COURT.—I suppose counsel will take your word for it, if you state where they came from.

Mr. ATKINS.—Will you stipulate?

Mr. RANKIN.—If you say Ward & Peterson made that brick.

(Testimony of Ralph K. Strong.)

A. I want to see the two side by side.

Mr. ATKINS.—I say this is a Shope brick, and this is a Ward & Peterson brick.

Mr. SHOPE.—Yes, we will admit it.

Bricks offered in evidence. Shope brick marked Defendants' Exhibit "X" Ward & Peterson brick marked Defendants' Exhibit "Y."

Q. Now, you see the marks there and you compare them and state what differences, if any, you find. [157—99]

A. Particles of sand are imbedded in the layer of cement, which is differentiated by the color in both cases. The particles of sand as they appear in the cement layer are completely covered by cement in both these cases, and the difference in depth of this upper treated layer in the cement in my opinion is simply due to the mixing up of the surface, that is, the top.

COURT.—That is the Shope brick?

A. That is the Shope, or X. This is the other, and after it goes down further, the colored part of this brick is simply due to the stirring up they give it, much more vigorous stirring than in the manufacture of this brick.

Q. Is there identity or difference, in your opinion, between the process you observed in the Shope Brick Company plant and that practiced in the Ward—Peterson?

A. As I observed the manufacture in both cases, the Shope surface was agitated a great deal more. In fact, I didn't observe any agitation in the case of the Ward—Peterson brick at all.

(Testimony of Ralph K. Strong.)

Q. Did there appear to be any agitation, as far as you observed, in the application of Ward—Peterson?

A. Of necessity must have been in trowelling back and forth, the movement of the particles one upon another, and must have been some mixing.

COURT.—I suppose, Professor, you mean in plain English that one was rubbed more than the other? A. Yes.

Q. And the laying on of the coating, the surface coating in the Ward—Peterson brick was gently applied?

A. More gently applied than in the case of the Shope?

Q. Did you notice in the Shope Brick Company what kind of a trowel was used? [158—100]

A. It was a float, and I believe a wooden float, although I didn't feel of it. It seemed to me I asked one of the workmen, but I couldn't swear that I did.

Q. What trowel was used in the Ward—Peterson? A. It was a steel trowel, thin faced.

Q. You think they were distinguished in that particular?

A. Yes, I would. The float was of the order of an inch in thickness, and were about the same superficial area.

Mr. ATKINS.—You may cross-examine.

Mr. RANKIN.—I would like until to-morrow morning to take up the cross-examination. Have

(Testimony of Ralph K. Strong.)
you introduced all the patents that are cited in the answer?

Mr. ATKINS.—I think so. I want to be sure. I intended to do so, and will compare them to-morrow morning, and be sure they are all right.

Mr. RANKIN.—There are two things. The patents have been put in, I suppose, subject to argument, although no testimony on them. I want to be able to get that testimony from the expert that we have for that purpose. Second, we have made several experiments. We want to introduce our brick that have resulted from these experiments. I also offer at this time—it was discussed informally by counsel and myself some time ago—that it would be a very great assistance to the Court, if the Court could take a trip over to the plant, and see it actually done, and I would offer it, and be willing to do it.

COURT.—I don't know whether I could promise that or not.

Whereupon proceedings herein were adjourned until to-morrow morning at 9:30. [159—101]

Wednesday, May 28, 1924, 9:30 A. M.

RALPH K. STRONG resumes the stand.

Cross-examination.

(Questions by Mr. RANKIN.)

Mr. Strong, you have read the specifications of the patentee in the patent in suit? A. I have.

Q. Do you find anywhere in those specifications that the patent mentions brick made solely of sand?

(Testimony of Ralph K. Strong.)

A. No, sir; I do not.

Q. As I understand it, we don't quarrel with whether the patentee has said this or that, but we may have a difference of opinion as to the interpretation of what the patentee says.

A. The experiment with sand was simply stated to be an experiment of the condition according to the specifications of the patent.

Q. Possibly you didn't hear my question. I said we have no quarrel with whether or not the patentee said this or that in his patent, but we may have a difference of opinion as to how that language should be construed. A. I presume so.

Q. Now, this patentee of mine—and I wish to use his exact language, says: "The block when formed and cured, is a porous body with interstices, voids or pores between the particles of sand and cement, to which mortar will adhere in wall construction but which must be waterproofed on its exposed face to prevent the absorption of moisture." Now, this contemplates and in fact produces, if made according to these terms, a surface which will have some voids, will it not?

A. Being made of solid particles completely, there must be some voids, of course. It would be impossible to pack solid particles so there wouldn't be voids. [160—102]

Q. Then you admit there would be some voids?

A. Certainly.

Q. Now, then, when we mix water and cement

(Testimony of Ralph K. Strong.)

upon the face—and I will call it for want of a better term, milk of cement. A. All right.

Q. Would there not be particles of cement small enough that some of them would enter the voids in the block?

A. I tried to make it perfectly clear. If the void is larger in diameter than the particles of cement is in diameter, of course it will fall in. It couldn't do otherwise. A matter of common knowledge.

Q. Then they would enter if smaller?

A. They enter the interstices if the void is larger in diameter than the particle of cement.

Q. Now the questions which you have so kindly answered me are within the language of the patent, are they not?

A. Not in my interpretation. A void—

Q. That is really for the interpretation of the Court, is it not?

A. You asked me for my opinion.

Q. Those questions that you have answered now are well within the language used by the patentee in his patent?

A. I believe not. Entering the pores, if he speaks of particles entering the pores which are open between the particles, as of sand or any mixture, it is apparent to any scientist that they would go there. It must mean, I should say then, as an expert, viewed from the chemical side, that it went further than that.

Q. What does this patent say?

(Testimony of Ralph K. Strong.)

A. Entering the pores.

Q. Then the answers to the questions are well within that language, are they not? [161—103]

A. That I should say, using your own language, would be for the Court to decide.

Witness excused.

Defense rests.

Mr. RANKIN.—Now, if the Court please, with the courtesy of counsel, we have here certain brick, they are numbered A, B, C, D and E. In order to expedite matters counsel has agreed to take my word for it, and I do state to the Court that these are manufactured on Shope brick machines, at the Shope plant, in the usual forms and usual methods that Shope brick are manufactured, and are Shope brick manufactured under Claim 2, with the exception that exhibits "D" and "E" each conform to my statements in all particulars except that the material which is used is a charcoal substance, for the purpose of illustration, and is not the usual material that is used in their blocks.

Mr. ATKINS.—I want it understood these are made in accordance with the terms of the patent as well as in accordance with Shope bricks.

Mr. RANKIN.—Yes, they are.

Exhibits offered in evidence and marked Plaintiff's Exhibits 11–A, 11–B, 11–C, 11–D, and 11–E.

Mr. RANKIN.—And further, as having no bearing on the case further than showing the Shope art, here are six bricks manufactured under the Shope patent and the Shope process, and really Shope

(Testimony of Ernest E. Werner.)

brick, commercially. We offer them as one exhibit.

Marked Plaintiff's Exhibit 12. [162—104]

Mr. RANKIN.—Further, by agreement of counsel, some of the patents that are in evidence will be eliminated for the sake of brevity, and if Mr. Atkins will kindly give me the patents upon which he relies, I will introduce my witness.

Mr. ATKINS.—I am not eliminating any, but will give you a list upon which we will probably rely exclusively. [163—105]

TESTIMONY OF ERNEST E. WERNER, FOR PLAINTIFF (IN REBUTTAL).

ERNEST E. WERNER, a witness called on behalf of the plaintiff, in rebuttal, being first duly sworn, testified as follows:

Direct Examination.

(Questions by Mr. RANKIN.)

Where do you reside, Mr. Werner?

A. St. Louis, Missouri.

Q. What is your business?

A. I am a consulting engineer, offices 37 South Vanderverter.

Q. What have you done to qualify yourself in your profession?

A. I have had several semesters—

Mr. ATKINS.—I admit the qualifications of the gentleman as an expert.

Q. Mr. Werner, I call your attention to the patent in suit of Mr. Shope, No. 985,709, and ask you if you have read the same? A. I have.

(Testimony of Ernest E. Werner.)

Q. I will ask you what in your opinion or your interpretation is the base of this patent.

A. The patentee describes it both in the claim and in the statement as a method of forming waterproof faced cement blocks.

Q. Does the patentee give directions comprehensively as to his intent? A. Yes, quite clearly.

Q. State as clearly and briefly as possible what these directions are, preferably separating that which is admittedly old from that which is claimed as new, having reference to the specifications, of course.

A. All that is necessary for the interpretation of this patent from my standpoint, of course, is contained in the first [164—106] paragraph of the second claim, page 1. The first sentence clearly speaks of something which is old, something which he does not claim except as an element in his patent, that is a semi-dry body upon which he wishes to place the facing. Shall I use the language of the patent or may I use my own—which do you prefer?

Q. As you prefer.

A. He says, "Water is next applied, as by sprinkling, to the face of the block in sufficient quantity to enter the pores or interstices of the block, and then a powder of cement, either neat or mixed with sand or other ingredients, is sifted upon the water." Claim 1 substantiates this description to this point. He then adds: "Which is at the same time agitated so as thoroughly to saturate the face of the block." The "same time" is rather

(Testimony of Ernest E. Werner.)

important. Now that clearly defines to me what he wishes to do. He now goes on to explain what will happen. "The water will thus enter the pores or voids of the block to the required depth, and carry with it the cement powder sifted thereon." That is purely an explanation. Then also "The water serves both to carry the cement into the pores and to cause crystallization of the added cement, and no external pressure will be required to force the water and cement into the block." That concludes his statement. The rest of the sentence merely expresses that he may thereafter do what he pleases, which presumably is his right. That, your Honor, in my opinion is the substance.

Q. We have had some testimony as to how cement and water act or interact in regard to colloids. In your opinion does this matter for the purpose of this patent?

A. Not everyone accepts the theory of colloids as applied to the cement industry, the utility of cement; this theory is being [165—107] more and more adopted, although still considerable controversy exists. I would say it enters to this extent; it throws considerable light upon the statement made by the patentee, as to carrying cement into the voids, I would rather think on the earlier steps of the formation of the ultimate colloidal gel. These earlier steps being merely the suspension of the cement in water, similar to what Dr. Strong referred to in his mud puddle. Cement is very much the same substance physically as clay. Further-

(Testimony of Ernest E. Werner.)

more, the standard cement is of varying fineness; I am speaking from memory, although I have little literature to verify it, your Honor. Twenty-five per cent of the ordinary cement will float upon a 200-mesh sieve. I believe there are standard Government specifications and I am rather referring to this than to scientific discussions on the subject. Also 25% of the particles will be finer than two ten thousandths of an inch. Now that is well within the borderland of suspension, such suspension as the doctor referred to in regard to mud. It does not take much imagination to visualize that when one takes a quantity of cement and a quantity of water—I think we can even fix the quantity—if one takes a large quantity of water and a small quantity of cement, one could use in part a colloidal suspension which will pass through a filter; I can see no difficulty why it should not enter the superficiary pores. Now, when one approaches this from the standpoint of the patent, this is dealing with indefinite quantities. The patentee says "sufficient" sufficient to enter the interstices or pores. One might reason this—rather let me put it this way; I would reason this way: That part of the cement, that part which enters—may I use his language—"some of the cement" will doubtless be put into this condition of suspension and thereby enter the pores. Dr. Strong spoke very correctly of the latter stages of the setting of [166—108] cement. Later on, this hypothesis may apply, this imaginary condition of gelation, a plastic colloidal gel be

(Testimony of Ernest E. Werner.)

formed, but we cannot reach that condition, if your Honor pleases, without getting preliminary our condition of suspension which functions for the patentee.

Q. You spoke in your answer of Dr. Strong's testimony. Do you agree to what the Professor said?

A. Not altogether. You mean yesterday or today?

Q. This morning.

A. Yes, quite. There is nothing between us at all.

Q. Now the patentee speaks of his porous body, one which is common in the art, which you have defined. What do you say as to the probability of ordinary commercial cement entering the voids?

A. I have answered that before. I believe, according to standard authorities, of commercial cement, twenty-five per cent will be finer at least than three ten thousandths of an inch, and of course as to the probability of having voids, the bricks will speak for themselves.

Q. Mr. Werner, you have been in the courtroom throughout the trial? A. I have, sir.

Q. And have heard the testimony of the defendant on the lack of infringement, as well as the witness Bilyeu's testimony upon the infringement? Would you say that this discloses a process substantially the same as that defined in the patentee's process?

Mr. ATKINS.—I object to that question as in-

(Testimony of Ernest E. Werner.)

competent. That is a question of law as to infringement.

COURT.—He can answer the question.

A. It is my impression, my mental impression, that the essence of this testimony was that these gentlemen—I have forgotten [167—109] the name—differed from the specific description of this patent to this extent: They applied what is technically known, or rather in the parlance of the trade, as slurry; this slurry is placed upon the face of the brick by means of a trowel and thereafter a brush was used which had been repeatedly dipped into water. The quantity of water was not stated. If one bears in mind what I have said before in regard to these minute small particles which at the early stage of formation are not jelly like, but can be readily dispersed, as cement slurries can be, and then say that if these defendants use a material quantity of water, not necessarily a large quantity, but material, this slurry will function to give up some of these small particles to now function according to the patentee, in other words, wash out sufficient of the cement, merely suspended cement, to enter the pores, the question to me is simply this: How much water do they use to do that?

Q. Mr. Werner, I present you with patent of C. W. Stevens, No. 624,563, dated May 9, 1899, and identified as Defendants' Exhibit "A."

A. Could I not facilitate matters: I have mine in the sequence of the amended answer. It would save an enormous amount of time.

(Testimony of Ernest E. Werner.)

Q. Mr. Werner, I call your attention to patent of William Wheeler Hubbell, dated May 30, 1871, No. 115,475. Have you read that patent?

A. I have.

Q. Does it have any bearing on the Shope patent? A. Not in my opinion.

Q. Would you kindly state the difference. This is [168—110] Defendants' Exhibit "D."

A. The patent is for a pavement. The patent says the surface shall be smooth, easy, gritty and pliant. Rather a difficult combination. It is just ordinary cement construction, and furthermore, this patentee uses chemical means for waterproofing.

Q. I call your attention to George Richardson's patent No. 461,890, dated October 27, 1891, marked Defendants' Exhibit "E," and ask you if you have read it? A. I have.

Q. And can you differentiate the same from the Shope patent?

A. You are speaking of the Richardson?

Q. Yes. A. Oh, most readily; yes.

Q. Will you please do so?

A. This patentee subjects his block while still in the mold, to a shaking motion to drive out air spaces and superfluous moisture. This mixture is allowed to set in the mold. In other words, no theory of removability there at all.

Q. I call your attention to Defendants' Exhibit "F." Thomas A. Good's patent, dated April 17, 1894, No. 518,239. Have you read that patent?

A. I have.

(Testimony of Ernest E. Werner.)

Q. In the same manner please differentiate that from the Shope.

A. This patentee, like Shope, forms a surface of pure cement, or indicates that he wishes to. He says his stone must remain in the mold for twenty-four hours prior to removal. That would not render itself to commercial mass production of brick.

Q. I call your attention to Defendants' Exhibit "G," being patent of Antonio Federici, No. 527,-416, dated October 16, 1894, and ask you if you have read it? A. Yes, part of it.

Q. Will you please differentiate that from the Shope patent [169—111] process defined in his patent?

A. This patent suggests the putting of large pebbles into a liquid mass of cement and allowing to harden the mass in the mold.

Q. I will call your attention to Defendants' Exhibit "H," patent of William J. Haddock, No. 531,842, dated Jan. 1, 1895, and ask you if you have read it? A. I have.

Q. Please differentiate it if possible from the Shope process defined in his patent.

A. The principal idea of this patent is to combine the use of an artificial and natural cement. It is for a block. The waterproofing is applied in a single layer, that is a stratum between the base and a layer superimposed upon the stratum, which the patentee speaks of as waterproof. In this case this patent as well as many others shows that the art made many efforts to produce waterproof brick.

(Testimony of Ernest E. Werner.)

Q. I call your attention to Defendants' Exhibit "I," patent of Johann Jungbluth, dated Aug. 3, 1897, No. 587,484, and ask you if you have read this? A. I have.

Q. Will you differentiate it from the Shope process?

A. This gentleman wishes to use a layer of pulverized asphalt at a seethingly hot temperature.

Q. I call your attention to Defendants' Exhibit "J," patent No. 624,563, of Charles W. Stevens, May 9, 1899, and will ask you if you have read it?

A. This is the adjudicated patent.

Q. The adjudicated patent, I mean. The one which counsel are emphasizing.

A. I don't think I can improve upon what the Court of Appeals said about this patent. I don't think it has much relation. [170—112]

Q. I call your attention to Defendants' Exhibit "K," of Frederick M. Emerson, dated Feb. 4, 1902, patent No. 692,644, and will ask you if you have read that. A. I have.

Q. What is the differentiation?

A. This is a veneer-faced block formed downward. There is no immediate removal from the mold indicated, and the patentee is under the impression that he can bind two layers or two varying layers of cement and water by tamping, forcing them mechanically together.

Q. I call your attention to Defendants' Exhibit "L," patent No. 703,644, dated July 1, 1902, of Edward Davies, and ask you if you have read it?

(Testimony of Ernest E. Werner.)

A. I have.

Q. Please differentiate it.

A. This is for fence posts.

Q. I call your attention to Defendants' Exhibit "M," patent No. 723,281, of William E. Jaques, dated March 24, 1903.

Mr. ATKINS.—You may omit that. We will not lay much stress on that.

Q. I call your attention to Defendants' Exhibit "N," William E. Jaques, No. 748,611, dated Jan. 5, 1904, and will ask you if you have read it.

Mr. ATKINS.—You may omit that also.

Mr. RANKIN.—Counsel stipulates it is out of the case.

Q. I will call your attention to Defendants' Exhibit "W," F. A. Malette, No. 751,089, dated Feb. 2, 1904, and ask you if you have read it. A. Yes.

Q. Will you kindly differentiate it from the Shope process as defined?

A. This man takes the larger portions of aggregate, covers them individually, in his language, with mortar. He puts them in a [171—113] mold and floats upon it the liquid cement. I don't think you could make bricks that way.

Q. I call your attention to Defendants' Exhibit "O," patent of Earl L. Brownson, No. 777,073, dated Dec. 13, 1904, and ask you if you have read the patent?

A. Yes. This patentee apparently endeavors to waterproof a stone by making a stone or casting a stone in two pieces, two sections, and later casting

(Testimony of Ernest E. Werner.)

in between them a waterproof layer to serve to bind the two parts of the stone together, and also to function as a waterproofing. In this case there is not even thought of a facing in the sense of Shope, or as occurs in the art frequently elsewhere.

Q. Mr. Werner, I call your attention to Defendants' Exhibit "P," from J. J. Cox, No. 814,358, dated March 6, 1906, and ask you if you can differentiate that patent from the Shope?

A. My notes say machinery only, and therefore of no interest. I may be mistaken, but that is my interpretation.

Q. I call your attention to Defendants' Exhibit "Q," No. 818,286, from W. Porten, dated April 17, 1906, and ask you if you can differentiate it from the patent in suit?

A. This man sifts cement into a mold made smooth. His thought is to get smoothness from the mold, to form a face; he now tamps the material with a coarse mixture. He evidently operates on the frequently occurring inverted principle, that is, he depends upon the moisture in the coarse mixture to force the water into the facing. He claims waterproofing, uses pressure, and by referring to page 2, line 10, implies immediate removal from the mold. I don't think it would be very feasible to make bricks that way. [172—114]

Q. I will call your attention to Defendants' Exhibit "R," No. 829,249, from George H. Bartlett, dated Aug. 21, 1906, and ask you if you can differentiate that from the patent in suit?

(Testimony of Ernest E. Werner.)

A. That is also a patent to make a smooth or ornamental face and also forms the block inverted. In other words, the facing is formed first, and the body superimposed. He uses a wet slurry which is put into a smooth mold, and then the slurry, the thin slurry, as he puts it, is then run downward, the mass is allowed to harden in the mold. It would seem that immediate removal of the brick manufactured is hardly possible.

Q. I call your attention to Defendants' Exhibit "S," No. 833,952, dated October 23, 1906, of G. Brown, and will ask you if it has any bearing on this case?

A. Again I may be mistaken, but I wrote on this as a machine patent only.

Q. I call your attention to Defendants' Exhibit "T," dated Apr. 16, 1907, being patent of Timothy W. McClenahan, No. 850,670, and ask you if it has any bearing on the process described in the Shope patent?

A. As I read this, this patentee states that he does not make a facing brick. He places a layer of sand upon a semi-dry aggregate, using this sand as a percolator. This seems rather the thought he has in mind—supplying water for crystallization.

Q. I call your attention to Defendants' Exhibit "U," No. 886,124, patent of John C. Henderson, dated April 28, 1908, and will ask you if you can differentiate that from the patent in suit?

A. Most readily.

Q. How?

(Testimony of Ernest E. Werner.)

A. He puts a semi-liquid mass into a nonporous mold and applies [173—115] a top surface dry Portland cement to absorb from said mass the excess of water. In other words he is operating per contra.

Q. I call your attention to Defendants' Exhibit "V," patent No. 958,194, Augustus O. Thomas, dated May 17, 1910. Can you differentiate this from the Shope patent?

A. On lines 55 to 65 this patentee says the following: "The addition of the powdered marble or other stone mixed with cement serves the immediate purpose"—I have no doubt it will be made clear—"the immediate purpose of forming a very thin outside layer on the face of high plasticity preventing, by a thickening or stiffening action, the surface tendency to run, due to the oozing of the water to the surface." In his claim, line 86 and on over to the end, he says: "in forming on the surface of said facing a thin layer in low plasticity by sifting on such surface powdered stone and cement to stiffen the surface of the facing and prevent the escape of moisture therefrom." Here is a man who clearly had the same intent Shope had. He however makes a three step operation, and consequently if one would operate Thomas, in view of the subsequent disclosure of Shope, one could produce doubtless a brick of Shope type. I don't think however that you could fairly read this patent as having had reference to Shope.

(Testimony of Ernest E. Werner.)

Q. Was this patent in the Patent Office at the same time the Shope patent was there?

A. Yes, it is curious that this patent was issued even ahead of the Shope, and that there seems to have been ample room for interference, but evidently the Patent Office considered Shope free of it.

Q. Mr. Werner, there has been some quibbling as to the result of [174—116] pressing or agitating, whether or not these functions are different. What do you say with respect to plaintiff and defendant doing the same thing in that regard?

A. The defendant doing what?

Q. Pressing or agitating.

A. Why, as I understand the thing—as I listened to the testimony as far as I could understand it, they were doing the same thing with this difference, that the contention was made that the float would function differently from a trowel, but in every other respect they must do the same thing, they can't help themselves.

Q. In your opinion, would there be any distinction between a float, or the result of agitating with a float which had a metal face, or a trowel?

A. Why no, assuming they both have the same physical condition of surface. There could be no difference.

Q. Would you call that process pressure or agitation?

A. The first operation, as practiced and used in my presence, I would call agitation, of course.

(Testimony of Ernest E. Werner.)

Q. Now, you had certain tests made at the Shope plant, didn't you? A. I did.

Q. I hand you a brick marked Plaintiff's Exhibit 11–A—and ask you if it was made under your direction. A. Yes, sir.

Q. And for what purpose? To illustrate what purpose?

A. Well, all my preliminary experiments were made in the laboratory and on a fairly extensive scale, but I did wish before I came into court to see whether or not the commercial operation coincided with what I had done in the laboratory, and with the patentee's description of his process.

Q. How was this brick, please?

A. Again, using roughly from memory patentee's description, [175—117] the semi-dry aggregate was mixed. May I, in reference to this disputed point, agitation and pressure, state the details? Six bricks were made simultaneously. There were six molds in bank. The upper surface of these molds, when in juxtaposition and ready to receive the aggregate formed a perfectly smooth surface over which either trowel or float or any other instrument which is wide enough to straddle it would of course float, in the full sense of the word, would not compress. Into this mold was placed the aggregate which was tamped and stricken off. On it was placed water and cement in the following fashion. The man would hold in one hand a sprinkling-can and in the other hand a can arranged to sprinkle or discharge a regulated quantity of cement and rapidly pass both over the mold. He would then

(Testimony of Ernest E. Werner.)

take this instrument which you have in your hand and use it. Now, as to whether or not, under those circumstances, there is much—some compression, one might quibble, but I would say that in view of the fact that the upper surface of the mold clearly restricts the downward motion or movement of the instrument used, one can call it, with perfect propriety, agitation.

Q. Now, was the brick, exhibit 11–A, made in that fashion?

A. Exactly in that fashion, and I had it made with the patent in view, reading to the workman each step, only separating it for him so that he would follow the thing.

Q. What did you find as to penetration, please?

A. I have illustrated that in a most drastic fashion. I can give you an opinion, but the brick will speak for itself.

Q. Was exhibit 11–B, that I now hand you, made in a similar way?

A. At the same time, under the same conditions, from the same [176—118] aggregate, with the same operation of sifting and application of water and cement, subsequently finishing with a trowel, smoothed.

Q. Was exhibit 11–C made in the same manner?

A. At the same time, from the same material, and in the same manner, and finished by the workman—I really don't know what he calls it, but it was with a trowel. Mr. Rankin, will you allow me to refer to my notes. I am quite sure—I speak from memory—you will not hold me to troweling or floating. We will not quarrel on it. Now, let

(Testimony of Ernest E. Werner.)

me see my notes. One cannot remember. This brick, 11–A, was stippled. In other words, it was finished with a brush, without the metal, or in the fashion which this client of yours finishes his brick. And the other two, my notes say that B was troweled and C was troweled, and something else, I don't know what they call that; bricks will speak for themselves.

Q. Did you make any test over and above the three exhibits you have before you? A. Yes.

Q. As to penetration?

A. Yes. If I may put it in my way: It occurred to me last night, after listening to Professor Strong, that his statement of no penetration was hardly in accord with experiments which I had made at my laboratory at St. Louis in similar fashion, and not knowing whether I had been mistaken at that time, I wanted to repeat it under commercial conditions. The experiment is hardly a fair one in this sense, that instead of using sand, as directed by the patentee, I substituted a ground coke. I am speaking fair in a commercial sense, for I cannot see that this patentee has said to me I cannot put this facing on ground coke if I wish to do it, if I formed a block from it. If your Honor pleases I would like to have this speak for [177—119] itself. I call it a slight penetration. May I have the exhibit broken now, if you please. I wish to break it in court.

Q. Break it in court. (Brick broken.)

A. May I call your Honor's attention to the fact that this brick was made last night?

(Testimony of Ernest E. Werner.)

Q. I hand you exhibit 11–B.

A. Could you oblige me by breaking the brick? (Brick broken.) May I pass this to his Honor?

Q. Do you find from your examination of it, Mr. Werner, penetration? A. Oh, unquestionably.

Q. I hand you exhibit 11–E, and ask you if it was made at the same time and under the same circumstances?

A. At the same time, under the same conditions, except that they put a fanciful finish on it, I don't know what they call it. Now this brick of course in course of time would harden very much.

Mr. RANKIN.—That is all.

Mr. ATKINS.—Mr. Rankin, you have no objection to breaking each of the exhibits?

Mr. RANKIN.—Not at all.

Mr. ATKINS.—Will you do so, so we may regard them as broken exhibits? (Bricks all broken.)

Cross-examination.

(Questions by Mr. ATKINS.)

Mr. Werner, referring to the patent in suit, of which you have a copy? A. Yes.

Q. I think you said, did you not, that this is a process limited to the making of any form of cement structure?

A. Now, Mr. Atkins, I can't answer that question. I can't interpret this patent, I can only give you my opinion. [178—120]

Q. I am induced to ask this question because you have talked about brick manufacture and have treated the patents relating to other manufactures somewhat contemptuously, if I may say so.

(Testimony of Ernest E. Werner.)

Q. If you please, I shall be very glad to answer any question you may ask, with the distinct understanding that it represents my opinion only, as I read the specifications and as I understand them.

Q. Will you refer to the last paragraph of the specifications of the Shope patent, and state what you understand from that to be the scope of the Shope alleged process?

A. This would make the scope of the alleged process, as you call it—I don't know why—it is a perfectly good patent.

Q. This also is opinion?

A. Well, no, on top of the document I find the name printed, "Patent." That paragraph practically removes the limit. This man wishes to put now his facing upon anything almost that can be made from cement.

Q. That is plain, is it not?

A. Yes, and clearly means to be put on any of them.

Q. It follows, of course, that this patent is not limited to the manufacture of a commercial brick, in any sense?

A. Mr. Atkins, my definition given to Mr. Rankin, if you please, was in the language of the patentee. That is his scope is forming a waterproof facing for any block. That is his own language. Now I don't know to what he limits that, I can't say.

Q. Will you refer to lines 55 to 58 of the specifications.

A. I have them. That is the first sentence of the paragraph.

(Testimony of Ernest E. Werner.)

Q. Yes. A. Yes.

Q. Which reads as follows: "In the present method the block is first formed in the usual manner by mixing sand and cement [179—121] in a slightly moist or semi-dry state and pressing or tamping it in a mould." A. Yes, sir.

Q. I think you have attempted to draw a distinction between a block that is made of sand and one made of some other aggregate.

A. I have tried to be fair, Mr. Atkins, in pointing out to the Court that it is in relation to the commercial manufacture. The experimental brick does not represent the aggregate of the patent but that is as far as I can go.

Q. Now, dismissing from your mind this question of commercial manufacture which you endeavor to stress, does not the patentee there say that he makes the block of sand and cement?

A. Yes, although there is also one place, line 17, where he says sand and cement.

Q. Now, what do you understand to be a process in patent parlance?

A. A sequence of operation tending to produce a result.

Q. Then this patent undertakes to teach a novel way of doing something in the art, does it not?

A. It must.

Q. Referring to Claim 1, please state whether you find in that claim a definite statement of sequence in any of the several steps of the operation.

A. Perhaps we can do it better if we read it together: "The herein described method of forming a waterproof faced cement block which consists"

(Testimony of Ernest E. Werner.)

—step one—"in first forming the block of suitable material in a semi-dry state, applying water to the face of the brick in sufficient quantity to enter the pores or interstices thereof." Step two—"Adding cement to the water whereby cement will enter the pores of interstices with the water." Whereby he will get the desired results.

Q. Is it your purpose to testify that the order or sequence is immaterial in this claim? [180—122]

A. This again is only my opinion. Inasmuch as the patent functions to carry cement into the interstices, I would say that as it concerns the invention, he clearly has as his object entering the pores of the block. Perhaps you will convince me to the contrary. That is my present opinion.

Q. I call your attention to the certified copy of the file-wrapper in the Shope case, Defendants' Exhibit "B." It appears in an amendment dated April 8, 1910—I may state parenthetically that I have numbered the pages of this exhibit in sequence, and that is page 12 of exhibit "B."

A. I have one here in which the action is dated on the part of the attorney April 8th. I prefer to use this one.

Q. I will ask you to state whether you are able to differentiate that claim from Claim 1 of the Shope patent.

A. May I have a copy of the Shope patent. Now —"The herein described method of forming a waterproof faced cement block"—which again is purely an identification mark—"which consists in first mixing cement and sand in a semi-dry state and molding it into a block, next covering the face

(Testimony of Ernest E. Werner.)

of the block with water and sifting dry cement upon it." Again, the third step—"Whereby the water will carry the added cement into the pores of the block without the application of external pressure." They are three identical steps leading to the same conclusion. Have I answered your question?

Q. Then there is no difference, in your opinion, between Claim 1 of the patent, and that claim which you have just read?

A. You might read the claim of the patent to me, so I may read this document. I want to be fair. [181—123]

Q. "The herein described method of forming a waterproof faced cement block, which consists in first forming the block of suitable material in a semi-dry state, applying water to the face of the block in a sufficient quantity to enter the pores or interstices and applying cement to the water; whereby the cement will enter the pores or interstices with the water."

A. Yes. In terms there is a distinct limitation of this patent now. In other words, this is now limited to sand and water. Is that the point you wish to make?

Q. Whatever you please, if you can draw a distinction.

A. That is the distinction as I see it. This first claim says in effect—

Q. Please identify when you say "This first claim."

A. Of the file-wrapper, the one removed from the patent. Well, now, Mr. Atkins, I would like to make a confession to you. You are far more skill-

(Testimony of Ernest E. Werner.)

ful than I in the interpretation of these patent claims. Why not ask me directly what the difference is and I shall try to be fair in answering. This way simply calls me to guard myself and my client. I simply must give exhaustive study before I answer. The other way you can get from me perfectly frankly what you wish.

Q. I wish to ascertain that frame of mind of yours in which you attempt to draw a distinction between what is old in the art and which purports to be stated to be novel in the claim.

A. I shall be delighted to give that. The art is as ancient as the pyramids, in its broad sense. An enormous amount of work has been done. Many men have endeavored to make blocks and most everything in creation out of cement. Some of them have attempted to make the very identical product, of course. There is no doubt you will find far more than I have been able to get indicative of a desire to do so, and many suggestions which [182—124] taken and assembled will give us the Shope theory. In my mind is this: I have been unable to find specifically either sequentially or otherwise, as I interpret, the thought of mixing—may I call *in situ*—I can't assist you here. In my mind this patent states—it is either that or nothing. I will make it very easy for you; mix *in situ*, that is what this patentee wishes to do. Whether he puts the water first or last or what he does, this is his invention as I see it. Now, I am quite open, is that fair?

Q. Perfectly fair and perfectly true, I think. Now comparing that Claim 1 from the file-wrapper,

(Testimony of Ernest E. Werner.)

with Claim 1 of the patent, will you state whether or not the only distinction is that in Claim 1 of the file-wrapper the block is limited to one made of sand and cement, and Claim 1 of the patent is differentiated by making the block of "suitable material." The question is clear to you, is it not?

A. Do I find in comparing these two claims any other difference? You haven't stated any difference in language and thought between them other than in the one case he may use suitable material and the other case, sand. Is that the thought in question? To do that I must be careful, I must study the thing for a moment. Now, perhaps this is what you wish, if so, I give it to you.

Q. I want your opinion. I don't want any more or less.

A. In one case he says "covering the face of the block with water and then sifting dry cement and sand in a semi-dry state, and molding it into a block, next covering the face of the block with water and then sifting dry cement thereon." And in the other case he says, "applying water to the face of the block in a sufficient quantity." Now, if you wish me to quote further, I shall be glad to do so.

Q. You do find, however, that differentiation I have mentioned? [183—125] That in the claim as allowed "a suitable material" is specified instead of cement and sand?

A. I believe I have said in direct and I am rather fair with you on cross-examination, what this patentee has described, and all of it he described, and more than all of it he described, since he puts in unnecessary things. I have also told you in very

(Testimony of Ernest E. Werner.)

plain language what my conception of the patent is. Now as to whether or not these terminological disputes between the Patent Office and the attorney here for the patent, it seems to me they are for his Honor, not for a technical expert, but I am quite willing to answer.

Q. Since it is a question the Court must pass upon, will you please be kind enough to answer the last question?

A. The last question: aside from the difference above mentioned, I now find an additional difference. The patentee, in his final claim, applies water to the face of the block in sufficient quantity, and in his file-wrapper claim he says—prior to the amendment and in no wise bound by it—"covering the face of the block," that is an additional difference. Are there any others?

Q. Is that all? Is that your answer?

A. So far. "With water and then sifting."

Q. You still—I am sure you do not intend to evade the question. A. Not at all.

Q. But you still fail to state that there is that distinction or differentiation between these two claims by the substitution in the claim of the patent, "suitable material" for sand and cement.

A. I have granted that, if you please, as one difference. Now, the next difference is that he now wishes to add "sufficient water." In the first instance he wished to cover the face of [184—126] the block. That is true. Now, if there are any more I shall answer.

Q. There is a substantial difference between the claim of the patent and this claim of the file-wrap-

(Testimony of Ernest E. Werner.)

per that we are considering in respect to the formation of the block, is there not?

A. There is not the slightest difference in the intent of the patent. There is considerable difference in the form of the claim.

Q. It is your opinion that there is no difference in the scope of the patent or the scope of the invention?

A. Again I cannot pass on that, but I will make it clear to you as best I can. It is purely a matter of interpretation, and of course I am interpreting it to the best of my ability for my client. When he says, "next covering the face of the block with water," is he in fact doing anything else but a step in his operation?

Q. I am talking about the block and not about the water. I concede that the application of water is substantially the same, I make no point upon that. As to the block I say there is a difference between "suitable material" and "sand and cement."

A. Now again we are at a disagreement. My conception of this patent is a facing.

COURT.—Isn't the difference in these two claims perfectly plain by the language in it?

Mr. ATKINS.—That is sufficient, your Honor, I will not press that further.

Q. Now, that Claim 1 of the file-wrapper has been erased. A. Evidently.

Q. And it was erased in view of this rejection, quoting from the file-wrapper, letted dated April 19, 1910? [185—127]

A. The next official in sequence.

(Testimony of Ernest E. Werner.)

Q. You have it?

A. "Claim 1 covers nothing beyond the ordinary process of laying cement sidewalks when the surface of the pavement is coated in whole or in part with water brought to the surface by tamping. It is accordingly rejected upon Haddock." May I say that as I read this it is a fair and honest opinion of the particular examiner who rejected it. I know nothing about it.

Q. But you are perfectly familiar with the patent practice?

A. Perfectly familiar to know that when there is a question of interpretation as it here exists, that must be decided in court, and that opinion is better than mine.

Q. And you know that when that claim was erased upon that rejection it was a confession that the invention as defined in that claim, was old in the art?

A. In the opinion of the particular examiner who made the particular rejection.

Q. And conceded by the erasure on the part of the applicant?

A. Why, if you wish to put it that way, it was conceded by the attorney representing the client. He was of the opinion that the examiner's opinion was good enough on it. In other words it would go. I know nothing about the attorney or the examiner.

Q. That, if you please, brings us to an examination of the Haddock patent, No. 531,842, Defendants' Exhibit "H," to which you have referred in your direct examination. Before entering upon

(Testimony of Ernest E. Werner.)

consideration of that patent I will ask you to state whether or not you are fully cognizant of the fact that the use of cement neat, as it is called, or a mixture of cement and water, constitutes a more or less waterproof coating, or waterproof layer, which is a coating or may be a coating? [186—128] A. More or less, I take it.

Q. But it is recognized in the art?

A. Old in the art.

Q. And that is the only waterproofing that the patentee in this suit, Mr. Shope, is attempting to secure?

A. You are speaking of waterproofing now, are you not?

Q. Water and cement.

A. When you say what this patentee wishes to secure you are speaking now of the waterproofing?

Q. I am speaking of waterproof coating.

A. Yes, I agree.

Q. Now, if you will refer to the Haddock patent.

A. Perhaps we can, with great deference—let us see whether we are apart. You have accused me of unfairness.

Q. I disclaim anything of that sort.

A. Let's see whether we are apart. We can save an enormous amount of time. I find in the Haddock patent, to put it very plainly, almost everything which Shope wishes to make, but I don't find anywheres a clear and concise and specific statement such as he makes, that if you mix on the top of your brick you will get a result. With this statement please proceed, because I merely want to help you see how much there is between us.

(Testimony of Ernest E. Werner.)

Q. Now, regarding this invention in suit, as a process or method of doing a certain thing, don't you find that process shown in the Haddock?

A. Not to my mental limitation; no, sir.

Q. May I ask you then to consider just what Haddock shows, and state whether layer B is not substantially the brick or the block which Shope uses?

A. Well, now, must I answer that yes or no? [187—129]

Q. I have no objections to how you answer it, so you answer it.

A. I think I said this morning Layer B is intended to be a waterproofing stratum in which he superimposes—shall we call it the facing, if you please—for the element D. Does that answer your question?

Q. No, it doesn't answer what I want to get.

A. Please repeat your question.

Q. I will ask you another question. Haddock, in the sentence beginning on line 76 of the specifications, says: "I employ the term 'moist' and wish it understood as designating a damp condition rather than a condition approximating a fluid or a wet condition. The mass so treated is then thoroughly tamped—"

A. Just a moment. I wish to take that up. I am unable to find—go ahead.

Q. "The mass so treated is then thoroughly tamped and compressed, the 'moist' condition of the mass preventing the water from oozing out as would be the case were the mixture over-saturated with water."

(Testimony of Ernest E. Werner.)

A. That is the patentee's language.

Q. That is just exactly what Shope does in his patent, is it not, in making his block?

A. What part of Shope's are you referring to?

Q. I am referring to the Shope block. Is not the process of forming a Shope block—and that is the term used in the patent—in this claim?

A. Yes, but I have already said to you that we have more: He adds to what he says there. I can't read him that way. I am reading him as facing on a block, and he says to me this block is old, and I don't care a picayune for it. [188—130]

Q. Have you any objection to answering the question as it is, please? (Question read.)

A. I do not.

Q. What is your answer?

A. I do not think so.

Q. In what respect is this step different from the Shope step forming a semi-dry block in a mold?

A. I say again, I must be very stupid. Are you talking now of the total block, the Shope product of his invention or a part of his block that he builds on. Please define your premises.

Q. Shope in his first claim says that his process consists of first forming a block of suitable material in a semi-dry state. A. Yes.

Q. Now, is that step anticipated in Haddock as I have quoted it to you?

A. Most certainly, and elsewhere.

Q. Just let us confine ourselves to Haddock. It is there in Haddock, is it not? A. Yes.

(Testimony of Ernest E. Werner.)

Q. Haddock continues "I then moisten this coating. The amount of material used in this step is sufficient to form a complete coating or covering and constitutes a stratum impervious to water."

A. Correct.

Q. Is that not the second step of the Shope patent?

A. May I say to you that the second step of the Shope patent only tends to form a coat making it impervious to water.

Q. I will put it this way, for your pleasure.

A. Oh no, I just want to be fair.

Q. The second step of the Shope patent is the application of water and cement, first sprinkling with water the block which he has formed. Now, is there any difference between that step [189—131] and the step which I have just quoted you from Haddock?

A. Is there any difference, if I understand the question, between one or the other means of sifting —sprinkling water on top of the block? Not the slightest. They both mean the same thing.

Q. Then had this Haddock method been interrupted at that point he would have had a Shope brick, wouldn't he? A. No, not by any means.

Q. Why not?

A. Well, Shope goes on further and you will no doubt lead me to that in a moment.

Q. What did he go on further and do?

A. First of all, Shope did something more. He gave me some instructions as to how much water I

(Testimony of Ernest E. Werner.)

should use—sufficient for his purpose. Next he sifted cement on it. That answers your question. That is Shope. I merely want to qualify that.

Q. Is not the whole Shope alleged process as defined in his Claim 1, shown in that part of the Haddock patents which we have been considering here?

A. To be fair, not to my mind.

Q. Not to your mind? A. No, sir.

Q. Will you object to stating how you differentiate the Haddock process from Shope?

A. I will be very glad to do so. I will give the mental process by which I arrive. Shope directs you to take a semi-dry aggregate tamping it into a mold. This becomes a matrix for further steps. Now he says sprinkle water on sufficient for his next step, sufficient to enter the interstices of the block whereby his next step will produce a result. Surely I can't read disjointed sections of this patentee whose ambition is similar [190—132] but whose method is different and stop at any one step. That is not in my mind.

Q. Haddock in Lines 91 and 92 says that after he has made this "I then moisten the coating."

A. Yes.

Q. Of course he moistens it to the degree to constitute a stratum impervious to water, as he goes on to say. A. Yes.

Q. Does Shope do any more or less than that?

A. Shope speaks intelligibly. You can take this Haddock patent or several other patents—I shall not help you with this—and practice them in the

(Testimony of Ernest E. Werner.)

light and sense of the Shope disclosure—may I call it the philosophy of his action—and you will get the Shope result, but I will not go so far as to say that any of the evidence patents—and there are quite a number of them—state this in any such fashion that I can go on making it without dissecting, without separating, without quibbling. That is only my point, nothing more.

Q. But all patents are addressed to one skilled in the art?

A. But skilled in the art does not mean one shall dissect out of something part of it. As I understand, it should be made so that one skilled in the art can read it and practice it but not anyone skilled in the art can take a portion of it and leave another portion of it off and do something. That is not my way. Perhaps his Honor will say—I have nothing to say. I am only trying to help.

Q. But Shope undertakes to teach to those engaged in this art a method of waterproofing cement blocks, does he not?

A. Call it teaching, if you please. He discloses it in the patent. I don't know. He says he will do that and he will get this result. [191—133]

Q. I won't indulge in discussing words, but that is what he is undertaking to do to tell the world he has made some improvement in the method of waterproofing cement blocks?

A. And I tell you, as far as my investigation goes, he did. I can see in the light of what he has told me that you can practice him without subtraction

(Testimony of Ernest E. Werner.)

or addition of certain matter from the language of other patents, and I have fairly tried in literature of the art, or in the patents, to find this simple statement in a simple fashion, to find the specific direction, but I have been unable; perhaps you are.

Q. No question of statement. It is a question of fact and knowledge that was communicated by Shope if it was communicated.

A. Mr. Atkins, in explicitly following the Shope instructions I get this result, that is as far as I can go.

Q. Perhaps you will admit this point, however, that if the application of a neat cement coating to porous bricks was new in Shope, as he assumed it to be, that it was also shown in Haddock?

A. I will not admit that. You are asking to admit in essence that the ham in a ham sandwich is the same as the bread. This man contemplates to make a three-layer structure, sandwiching a waterproof coating in there. I think he did. I grant he made it. I won't quarrel with you.

Q. If we were talking about a product that would be true, but we are talking about a process, and all Mr. Shope undertakes to communicate to the public in exchange for this patent was done by Haddock, was it not? A. That is your testimony, not mine.

Q. Do you contradict that?

A. I do not agree with it for one moment. [192—134]

Q. You say then that Haddock did not show the

(Testimony of Ernest E. Werner.)

application of a coat of wet cement to a semi-dry cement block?

A. I say to you that he may have done so in language. For all I care he has anticipated Shope. To my mind not even a suggestion of the clear language of Shope.

Q. And when you refer to your mind in that connection you refer to an unbiased highly technical mind, I take it?

A. I sincerely hope so, unbiased at least.

Q. I ask you now to refer to the Federici patent No. 527,416, Defendants' Exhibit "G," and ask you to state whether Figure 3 of the drawing in that patent, as described in the specifications, does not show a cement block D with plastic coating C upon it?

A. It shows in the cross section a block and it looks like a set of teeth, but I have to read the specifications. The question is what? What this figure alone conveys to me. Apparently it shows something of the sort, yes.

Q. How would you distinguish as you have undertaken to do, that disclosure from the Shope process alleged?

A. I find myself in this difficulty, that they don't resemble each other in thought or in conception. I may be at fault. Shope is for a patent to produce in a specific fashion a specific result. That is my comprehension of it. What is the claim in this? He says, "Into the surface of which pebbles of substantially uniform size are partially embedded."

(Testimony of Ernest E. Werner.)

The illustration shows he has not in mind any more than a building block. As I have said to you cement faced building blocks or even bricks are old except as made in a specific method. I think you ought to show that this is a method of Shope.

Q. I asked you to refer to line 29 of the Federici.

A. "A—represents stones and pebbles. B—the pebbles. C—a layer of pure cement." [193—135]

Q. C—a layer of pure cement? A. Yes, sir.

Q. That is a waterproof layer, is it not?

A. Yes, sir, in the sense that we discussed it.

Q. And it is applied to the block D below it?

A. Yes, upon the pebbles B.

Q. What?

A. It is upon the block below; the block below, B being formed here as shown. A represents what? The stone. B the pebbles. Both may be of cement.

Q. But that does show a cement block with pure cement coat C, does it? A. Block, yes.

Q. In what respect is that different from the Shope? A. As a finished block?

Q. I am speaking about process always, because that is the only thing in issue here.

A. This is for an article of manufacture, not a process in this patent. This is an article of manufacture.

Q. An article of manufacture must show a process.

A. All right. Let's go to the next step. This is his language. If I am to construe this as a process, he says, "While the material is yet plastic"—

(Testimony of Ernest E. Werner.)

COURT.—That is not the question.

A. Please, I will try to answer it.

COURT.—The question is whether it shows a cement layer, pure cement layer on the block.

A. It does, indeed it does.

Mr. ATKINS.—I feel disposed to apologize to the Court for taking so much time, but the question has been fairly raised and must be met unless the Court is satisfied upon this point. [194—136]

COURT.—Anyone can see by looking at that patent, or reading it, that it shows a layer of pure cement on the block.

Mr. ATKINS.—Yes, that is all I see in that. It appears to be necessary to refer to the Stevens Patent 624,563, for the reason that you have in your direct examination said you did not discover that that has anything to do with this case. (Defendants' Exhibit "A.")

A. Unless my memory serves me wrong, I merely said that I didn't disagree with the Court of Appeals.

Q. I think we may dismiss it with that explanation. Will you now refer to Patent No. 703,644, of Davies, Defendants' Exhibit "L," and state whether that does not show a block made of semi-dry cement subjected to a coating of waterproofing cement mixture.

A. The specification itself does not show that. I have dismissed it in my notes as for cement posts hardened in the mold. I mean left in the mold to harden. He fills mold 1, "which may be of any pre-

(Testimony of Ernest E. Werner.)

ferred shape, with a mass of damp sand, gravel and cement, mixed in suitable proportions" to produce the best results, and this composition is pounded into the mold "to cause a close adherence of the molecules of the composition, the sides 2 of the mold being closed up as shown in figure 1 etc." "To present the proper openings or holes through which the wires are passed for securing the fence wires in position, etc." I think he does all you claim, except no indication in my mind to Shope or method. I said everything else of the Shope brick but his method.

Q. The Shope process is shown there, it it not?

A. Not in my mind. Where is the instance?

Q. May I ask you to refer to the sentence beginning with line 75, page 1 of specifications? [195—137]

A. "When the composition has become sufficiently set to permit of the posts being handled without danger of breaking and before it has become finally set—" but he says when it has become sufficiently set. He is waiting for this—"the sides of the mold are let down and the post is removed from the mold and dipped into a bath of pure liquid Portland cement of such fluidity as that it will run smoothly and evenly over the entire exposed surfaces of the post, and fill all cracks, crevices and interstices except the openings left by the bars." We are in perfect accord. This man speaks of interstices and bars, and wishes to dip his brick into a liquid bath of cement. That is quite true.

(Testimony of Ernest E. Werner.)

Q. Is there any difference between subjecting it by dipping and by mixing the cement *in situ,* if you will pardon my method of pronounciation of Latin?

A. No copyright on pronounciation or phrase. A decided difference, and surely you will not ask me as a mechanic, or as an engineer, or as a mere scientist, to tell you there is not; but whether or not there is a difference I couldn't follow this on the face of it as a brickmaker, and make the Shope brick. Now, I can't read it that way with great deference.

Q. Do you mean to say that you would not get—by dipping you would not get all the Shope brick gets?

A. You would get exactly the same result Shope does provided you dip intelligently. What I want to say is this, you get exactly Shope results by dipping. May I again say, although you have resented it, that method would hardly render itself for commercial production in masses of brick. I really feel I must draw the Court's attention to that.

Q. I am of course endeavoring to give all the information I can. [196—138]

A. We are in perfect accord, that by dipping Davies' brick after it has set, as described here, in a liquid bath cement, the cement would enter the interstices and you would get the Shope result by entirely different and in my very humble opinion some foolish steps.

Q. Again I ask you to refer to this Davies' patent, page 2, line 4, and will ask you what this means.

(Testimony of Ernest E. Werner.)

A. "Heretofore fence posts have been given a surface coating by applying the surfacing material by means of a brush." Am I to interpret what that means, or shall I read it?

Q. I asked what it means.

A. "This is a laborious operation requiring considerable time and resulting in an unequal and unsatisfactory surfacing of the posts. In view of this disadvantage it is the essential object of my invention to secure a uniform protective surfacing." There is nothing between us. I have said you will not get your coat or a perfect finish. The patent concludes, "by dipping the posts," or, reading it your way, "by dipping the brick in a bath of liquid cement, which operation may be quickly carried out, and results in a uniform coating." I perfectly agree with him and still say he is foolish.

Q. That Davies' patent was applied for in 1901? A. That is so.

Q. And the last quotation referred to is a plain statement that it was old in the art to rub upon the posts a coating of pure cement?

A. Well, it was known to smear liquid masses over anything that you wished to cover with them.

Q. And that is exactly what Shope does?

A. That is for his Honor to decide.

Q. Is it not? Does he do anything else? [197—139]

A. He gives you a perfectly clear, sound theory. He says, do certain definite things and you will get a certain definite result. That is what he says, to my mind.

(Testimony of Ernest E. Werner.)

Q. And Davies did that in 1901, didn't he?

A. Exactly. He says to take your bricks and dip them in a liquid bath of cement, and he does that in clear and concise language.

Q. And he says it was then old to smear instead of dip? A. I can't testify it was.

Q. Does he not say that?

A. He does, his language speaks for itself.

Q. And that is what he says?

A. That is what he says. It is printed in the patent.

Mr. ATKINS.—I don't deem it necessary to go into this art further in detail. I think the Davies patent brings it clearly home that whatever Shope has done was done by Davies. I am not dismissing the other patents from consideration when the time comes, but I don't want to take the time of the Court to examine the witness on it, and I am not agreeing with his statement that he has made in regard to them.

A. We agree to ultimately disagree.

Witness excused.

Mr. RANKIN.—Counsel will stipulate for whatever it is worth that Shope does use both wood and metal face float.

Plaintiff rests.

Defense rests.

Approved as evidence in this case.

(Sgd.) R. S. BEAN,
Judge.

June 17, 1924. [198—140]

UNITED STATES PATENT OFFICE.

DAVID F. SHOPE, OF ST. PAUL, MINNESOTA.

METHOD OF WATERPROOFING CEMENT BLOCKS.

985,709. Specification of Letters Patent. Patented Feb. 28, 1911.

No Drawing. Application filed October 9, 1909. Serial No. 521,796.

To all whom it may concern:

Be it known that I, DAVID F. SHOPE, a citizen of the United States, residing at St. Paul, in the county of Ramsey and State of Minnesota, have invented certain new and useful Improvements in Methods of Waterproofing Cement Blocks, of which the following is a specification.

My invention relates to the method of forming cement blocks having a water-proof facing, its object being to water-proof the exposed face of the block without the application of external pressure or the use of special water-proofing compounds, and in such manner that the block can be immediately removed from the mold.

Cement blocks, as distinguished from cast stone, are usually formed by pressing or tamping in a mold a mixture of sand and cement in a damp or semi-dry state so that the blocks can be immediately removed from the mold. The block, when formed and cured, is a porous body with interstices, voids, or pores between the particles of sand and cement, to which mortar will adhere in wall construction, but which must be waterproofed on its exposed face to prevent the absorption of moisture.

Where a special water-proofing compound is used, it is apt to destroy perfect crystallization during the curing period as well as to discolor the block. And where a special water-proofing compound is not used, the surface to be water-proofed must be thoroughly wet in order that the cementitious material used for water-proofing shall enter the pores of the block and become thoroughly crystallized so as to form a perfect union. In the manufacture of what is called "cast stone," the cement and aggregate (sand, marble dust and the like) is mixed to a flowing mass and cast in a mold, from which it cannot be removed until it has hardened and set, that is from three to ten or twelve hours, according to the temperature and set of the cement. It is impracticable to apply this liquid process to cement blocks by placing in the bottom of the mold a sloppy mixture of cementitious material and then forming the cement block upon it, because the block cannot be removed from the mold until the wet mixture has set, and the cementitious material will not enter the pores of the block except under pressure.

In the present method the block is first formed in the usual manner by mixing sand and cement in a slightly moist or semi-dry state, and pressing or tamping it in a mold. Water is next applied, as by sprinkling, to the face of the block in sufficient quantity to enter the pores or interstices of the block, and then a powder of cement, either neat or mixed with sand or other ingredients, is sifted upon the water, which is at the same time agitated so as thoroughly to saturate the face of the block. The water will thus enter the pores or voids of the block to the required depth, and carry with it the cement powder sifted thereon. The water serves both to carry the cement into the pores and to cause crystallization of the added cement, and no external pressure will be required to force the water and cement into the block. The face of the block is then stippled or otherwise treated as may be desired, and the block removed from the machine and cured in the usual manner.

It will be understood that the main portion of the block remains in a comparatively dry state so that it can be immediately removed from the mold, and all its faces, except those exposed to the water and crystallizing mixture, will be porous so that the mortar will adhere to them, while the outer face will be proof against the absorption of water because all of the interstices and pores have been filled with crystallized cement.

The word "block" is here used generically to include a brick, tile or other mass of any shape or size, as well as a "block" technically so called.

I claim as my invention:

1. The herein described method of forming a water-proof faced cement block, which consists in first forming the block of suitable material in a semi-dry state, applying water to the face of the block in a sufficient quantity to enter the pores or interstices thereof, and adding cement to the water, whereby the cement will enter the pores or interstices with the water.

2. The herein described method of forming a water-proof faced cement block which

consists in first forming the block by mixing sand and cement in a semi-dry state and molding it, then applying water to the face of the block, then spreading cement upon the water and agitating the mixture to carry the cement into the interstices of the block to the required depth.

In testimony whereof I affix my signature in presence of two witnesses.

DAVID F. SHOPE.

Witnesses:
EDWIN R. HOLCOMBE,
H. SMITH.

DEFENDANTS EXHIBIT "A".

No. 624,563. Patented May 9, 1899.

C. W. STEVENS.

PROCESS OF MAKING ARTIFICIAL STONE.

(Application filed Nov. 12, 1897.)

(No Model.) 2 Sheets—Sheet 1.

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Fig. 1.

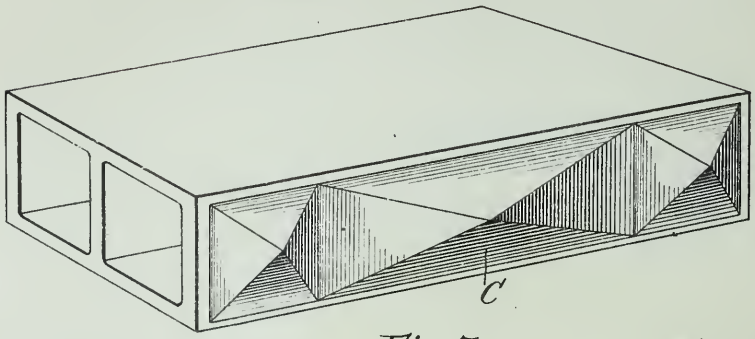


Fig. 2.

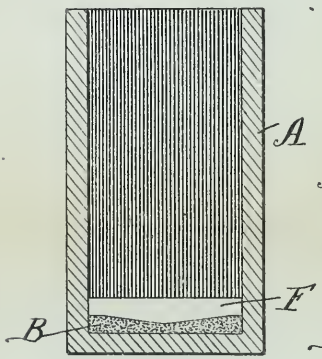


Fig. 3.

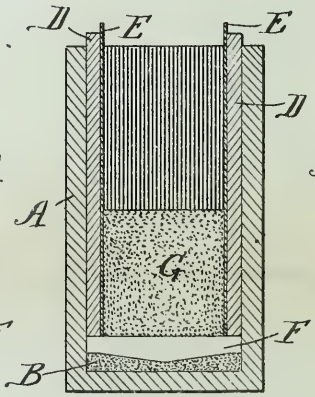


Fig. 4.

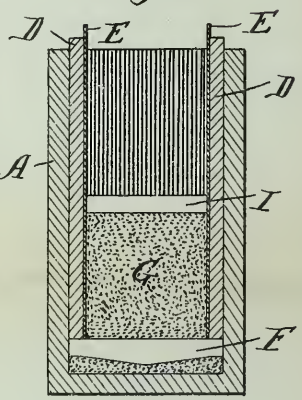


Fig. 5.

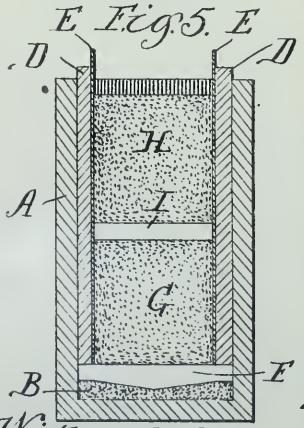


Fig. 6.

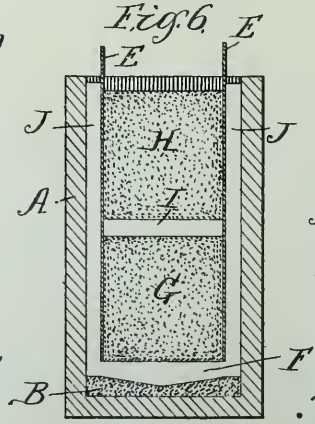
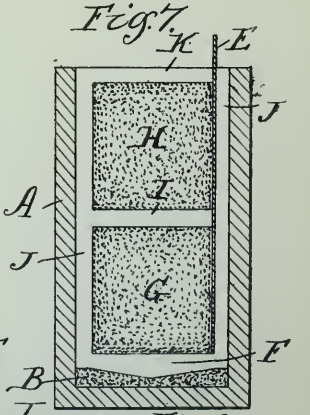


Fig. 7.



Witnesses.
Wm. M. Rheem.
Wm. A. Fleming.

Inventor
Chas. W. Stevens
by Raymond & Cushman Attys

No. 624,563. Patented May 9, 1899.

C. W. STEVENS.

PROCESS OF MAKING ARTIFICIAL STONE.

(Application filed Nov. 12, 1897.)

(No Model.) 2 Sheets—Sheet 2.

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Fig. 8

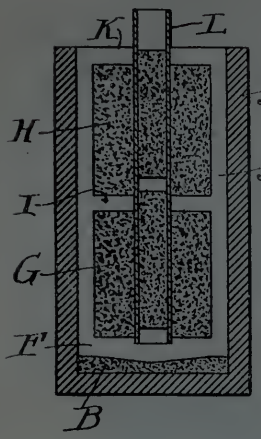


Fig. 9

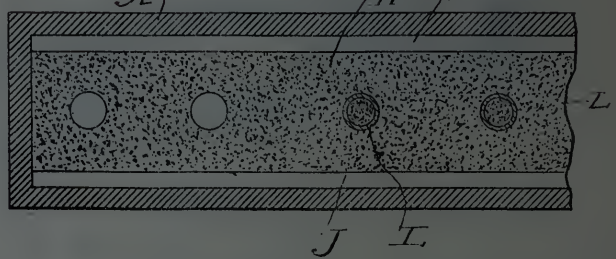


Fig. 10

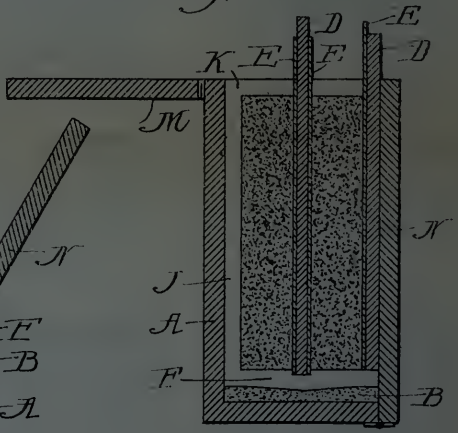
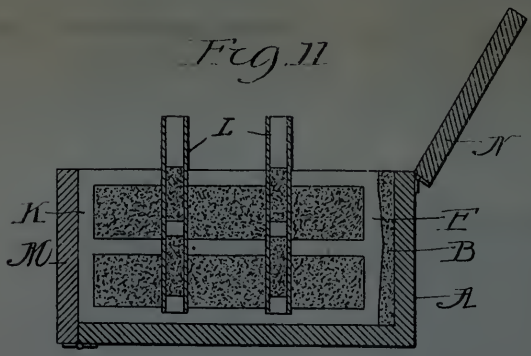


Fig. 11



Witnesses
E. W. Bartlett
Wm. M. Rheem

Inventor
Chas. W. Stevens
by Raymond & Dushmund
Attys

UNITED STATES PATENT OFFICE.

CHARLES W. STEVENS, OF HARVEY, ILLINOIS.

PROCESS OF MAKING ARTIFICIAL STONE.

SPECIFICATION forming part of Letters Patent No. 624,563, dated May 9, 1899.

Application filed November 12, 1897. Serial No. 658,273. (No specimens.)

To all whom it may concern:

Be it known that I, CHARLES W. STEVENS, a citizen of the United States, residing at North Harvey, in the county of Cook and State of Illinois, have invented certain new and useful Improvements in Processes of Making Artificial Stone, of which the following is a full, clear, and exact description, reference being had to the accompanying drawings, forming a part of this specification.

This invention relates to improvements in the processes for the manufacture of artificial stone, and particularly to that class exemplified by Letters Patent of the United States No. 583,515, granted to me June 1, 1897.

The object of the present invention, generally stated, is the same as the object of the invention disclosed in the said Letters Patent—to wit, the production of either plain or ornamental artificial stone in the place where it is to be permanently used or in a factory from whence it is distributed for use.

The object of the present invention, more specifically stated, is an improvement in the processes for manufacturing artificial stone, whereby either solid or hollow, plain or ornamented artificial stone may be produced, adaptable for any building purposes, such as cornices, courses, fronts, or any other purpose to which natural stone is generally applied in building, and at the minimum cost, both of material and workmanship, and of such simplicity as to dispense with the employment of skilled labor.

The process described in my former patent above mentioned is what I have designated as the "dry" process, the stone-producing compound being therein molded and manipulated in a dry powdered form in the molding operation and subsequently saturated with water. In my present invention, which I have designated as the "wet" process, the stone-producing compound is molded and manipulated in a wet or plastic state, and the final step of saturation of both the compound and the molding-sand is dispensed with, the molding-sand in my present invention being comparatively dry and relied upon to extract or absorb the moisture from the stone compound.

In carrying out my process any suitable form of apparatus may be employed; but I have found by practice that the apparatus illustrated in the accompanying drawings possesses many advantages over any other apparatus known to me.

I will therefore describe and illustrate my said novel apparatus in connection with my process as the preferred form of apparatus for carrying out the same, without, however, desiring to in any manner limit my invention to the use of such an apparatus.

In the drawings, Figure 1 represents a perspective view of a typical completed hollow stone as produced by my process. Figs. 2 to 7, inclusive, illustrate one way of using my preferred form of apparatus in carrying out my process, as will be described in detail farther on. Figs. 8 to 11, inclusive, represent detail views illustrating a further use of my invention for producing a superior article of manufacture by my process, as will be described in detail farther on.

While my process is adaptable to the manufacture of any kind, form, or configuration of stone, it is particularly applicable to what is called "hollow stone," resembling in shape the ordinary terra-cotta hollow building-tiles with strengthening cross-webs, for cornice-work, ornamental coursework, entire fronts, and the like, and I will therefore describe my process in detail as employed in the manufacture of such hollow stone, it being understood, of course, that the apparatus, even of my preferred form, must be varied as to dimensions, configuration, and use, according to the article which it is desired to produce.

Referring now to the drawings, I will first say that we will assume the form of hollow stone illustrated in Fig. 1 is sought to be produced by the apparatus in the manner illustrated in Figs. 2 to 7.

I first take a box A, of suitable dimensions, corresponding to a molder's flask, the inner walls of which I prefer should serve as the faces against which all of the outer plane faces of the stone article shall be molded except the ornamented and opposite faces thereof. In the bottom of this box I place a suitable layer of fine molder's sand of any suitable thickness and in a just sufficiently-moistened condition to hold its form when pressed to any desired shape. In other words, I pro-

pose to have this sand as dry as possible for the intended purpose. Into this sand with a suitable pattern I impress the shape of the ornamented face desired—such, for instance, as the face C of the stone illustrated in Fig. 1—which pattern should preferably extend over the entire area of the interior of the box. I next pour into the impression thus made the stone compound in a plastic or semiliquid state, sufficiently wet to flow easily and to a depth corresponding with the desired thickness of the hollow stone. This compound may consist of any stone-producing mixture of materials and may be either colored throughout or mixed to produce a mottled effect or to produce contrasting colors on the face of the ornamental stone, and, in fact, different colors of the compound may be poured to form different parts of the ornamented face. This first manipulation, as far as described, is illustrated in Fig. 2. I next insert the parting-boards D at the vertical sides of the box, which are faced with metallic facing-plates E of suitable form upon the interior of the box. Both the parting-boards and facing-plates rest upon the back or top of the ornamented stone facing and preferably extend a little beyond the upper edges of the box. I then fill in the box, say, to about one-half its depth (or to any other point, according to the number of strengthening-webs desired) with the molding-sand, as at G, in as nearly dry a state as is practicable, and upon this sand filling pour a suitable layer of the stone compound in a plastic or semiliquid state. Figs. 3 and 4 serve to illustrate the use of the apparatus as thus far described. I next fill in with more molding-sand, practically dry, nearly to the top of the box, as illustrated at H in Fig. 5. Having now formed in the sand the ornamented front wall F and the strengthening-web at the center of the hollow stone, I next successively draw out the parting-boards D and pour into the spaces formed by them the stone compound, which flows down to and unites with the front F and the strengthening web or partition I, thereby forming the sides J of the hollow stone, as illustrated in Fig. 6. I next withdraw the facing-plates E, as illustrated in Fig. 7, and fill in to the top of the box with the stone compound, which unites with the sides J and forms the back wall K of the hollow stone. The hollow stone is now completely molded and may now be laid aside for setting or curing in any well-known or desired manner, according to the compound used.

The use of the parting-boards is desirable, as will be readily seen, in order to have a wall to build against and at the same time which may be withdrawn to allow the stone compound to flow in and take its place. The use of the metallic face-plates, in connection with the parting-boards, is also very desirable, because neither the sand nor the stone compound will adhere thereto, as they would to the parting-boards, and hence when withdrawn they leave comparatively sharp and square edges as between the stone material and the molding-sand, thus producing an article of superior finish. I may also say that if found desirable the top layer of stone compound, forming the back K of the hollow stone, may be covered with a sufficient layer of sand to properly aid in the absorption of the moisture from this part of the compound and at the same time protect the same against the direct action of the atmosphere thereon, which might in some cases produce weather-checking.

It will of course be understood that I have herein illustrated and described the simplest form of apparatus and a type of the simplest form of hollow stone which can be produced by my process, and it will of course be understood that in the making of artificial stone of different shapes, contours, and dimensions the box, the parting-boards, and the facing-plates must be modified accordingly, for obviously hollow stone with both ornamented sides and ends or with obliquely or otherwise disposed ornamentation and contour extending in various directions may be produced by my process and apparatus without any variation whatever in the process and practically no variation in the apparatus, excepting that the use of the parting-boards and facing-plates would probably in all cases be limited to the plane surfaces, although that is not absolutely essential, because the blocks may be molded with either top, bottom, sides, or ends uppermost or in an oblique position, according to the particular article being made. I have also found by practical experience that in the molding of either delicate or intricate ornamental designs the best results can be obtained by first filling in the impression of the pattern made in the sand to the depth of about an eighth of an inch with dry stone compound and backing it up with the liquid compound, because the fine lines and sharp edges will be better brought out, the dry powdered stone compound entering the depressions formed by the pattern more perfectly than the plastic or semiliquid compound. I have also found that where it is desirable greater strength may be given the hollow stone, either laterally or longitudinally, than is afforded by the strengthening web or partition formed therein in the molding of the stone by providing posts extending between the exterior walls, either front and back or sides, and also, if desired, between the partitions and the external walls. These posts are formed of the stone compound in the manner about to be described, it being understood that in both cases the posts are formed before the hollow stone is allowed to set or is cured. In other words, I am able to produce by this process an article superior in strength to that produced by any other process and by the use of the same apparatus employed in carrying out the process.

In producing a hollow stone thus strengthened of the form illustrated in Figs. 1 to 8 of the drawings I would take a tube L, preferably metallic, and after the stone is completed, as illustrated in Fig. 7, I would force the tube through both the back wall K and partition I, partly through the front F, and of course through the sand fillings or layers G and H and then withdraw the tube, carrying with it the sand and stone compound by which it will be filled. As many of these holes as desirable may be formed along the length of the stone and then filled with the plastic or semiliquid compound up to a level with the surface of the back wall K. Each post will form a homogeneous union with the back and front walls and the partition, besides extending therebetween, so that when the filling-sand is removed from the stone these posts will serve as braces between the front and rear wall and the partition or strengthening-web. In Fig. 8 I have illustrated a vertical section of the molding-box with the stone complete, showing the manner of using the tube L to form the posts. In Fig. 9 I have illustrated a horizontal section of the same, but showing some posts completed and others with the tubes in place preparatory to making the holes for the posts.

In Figs. 10 and 11 I have shown how a hollow stone formed with its ornamented face down and having a strengthening-web at right angles to the back wall K thereof may be provided with posts extending through such partition or web and between the upper and lower walls or sides of the block parallel with the back wall. In such case I prefer to employ a hinged top M and a hinged side N for the mold-box in order that the posts may be formed through the sides of the hollow stone after the same has been formed face downward or in a position at right angles to that in which the posts are formed. In this apparatus it will be noticed that the parting-board D has a facing-plate E on each side thereof to form the strengthening-web, and it will of course be understood that the same means can be adopted for forming the side walls J, in which case of course the side parting-boards D would be set a suitable distance away from the sides of the box or flask, and a layer of sand would intervene between said boards with their double facings and the sides of the box. The stone will thus be formed by molding the stone compound wholly in sand—that is, with sand on all sides or upon each side of each layer of the compound.

I may here state that while the hollow building-stone may be the more common form in which such stones are produced it is within the purview of my invention to produce solid stone blocks or to produce solid flat or concave tiles for use in ornamental coursework, in which case the apparatus would necessarily consist only of a box of the desired shape and dimensions, for after the impression is made in the sand in the bottom of the box the compound will be poured in to a suitable depth and then backed up by a sufficient layer of sand to properly absorb the moisture.

Having thus fully described my invention, what I claim, and desire to secure by Letters Patent, is—

1. The process of forming artificial stone consisting in molding the stone compound while in a plastic or semiliquid state in or on a mold formed of relatively dry sand and then allowing the mass to set until the sand absorbs the surplus moisture from the compound, thereby converting the latter to a solid or non-liquid form, substantially as and for the purpose set forth.

2. The process of forming artificial stone consisting in molding stone compound while in a plastic or semiliquid state, in or on a partial mold formed of relatively dry sand, and then covering the compound with relatively dry sand and finally allowing the mass to set until the sand absorbs the surplus moisture from the compound, thereby converting the latter to a solid or non-liquid form, substantially as and for the purpose set forth.

3. The process of forming artificial stone consisting in molding layers of stone compound while in a plastic or semiliquid state between or on layers of relatively dry sand and then allow the mass to set until the sand absorbs the surplus moisture from the compound, thereby converting the latter to a solid or non-liquid form, substantially as and for the purpose set forth.

4. The process of forming artificial stone consisting in first molding layers of stone compound while in a plastic or semiliquid state between or on layers of relatively dry sand, then removing a portion of such layers of compound and sand and replacing such removed portions with stone compound in a plastic or semiliquid state and finally allowing the mass to set until the sand absorbs the surplus moisture from the compound, thereby converting the latter to a solid or non-liquid form, substantially as and for the purpose set forth.

5. The process of forming artificial stone consisting in first forming in relatively dry sand a partial mold of one or more faces of such stone, next filling into the partial mold thus formed a lining or layer of stone compound in a dry powdered state, then molding thereon a layer of stone compound in a plastic or semiliquid state next covering the compound with relatively dry sand and finally allowing the mass to set until the sand absorbs the surplus moisture from the compound, thereby converting the latter to a solid or non-liquid form, substantially as and for the purpose set forth.

CHARLES W. STEVENS.

Witnesses:
WM. O. BELT,
C. L. WOOD.

DEFENDANTS' EXHIBIT "B."

[Endorsed]: U. S. District Court, District of Oregon. Filed April 4, 1924. G. H. Marsh, Clerk.

DEPARTMENT OF THE INTERIOR,
UNITED STATES PATENT OFFICE.

To all persons to whom these presents shall come,
GREETINGS:

This is to certify that the annexed is a true copy from the records of this office of the File Wrapper and Contents, in the matter of the

LETTERS PATENT OF
David F. Shope.

Number 985,709,

Granted February 28, 1911.
for

Improvement in Methods of Water Proofing Cement Blocks.

IN TESTIMONY WHEREOF I have hereunto set my hand and caused the seal of the Patent Office to be affixed, at the City of Washington, this twenty-fourth day of October, in the year of our Lord, one thousand nine hundred and twenty-three and of the Independence of the United States of America the one hundred and forty-eighth.

WM. A. KINNAN,
Acting Commissioner of Patents.

(Seal—Patent Office United States of America.)

(1) [212]

Div. 15 1909 (Ex'r's Book) 66 59–14

PATENT No.—985709.

Number (Series of 1900), 521,796.

Name—David F. Shope.

Of St. Paul,

State of Minnesota.

Invention: Method of Waterproofing Cement Blocks.

Original.

Petition— Oct. 9, 1909.

Affidavit— " " "

Specification— " " "

Drawing— none.

Model or Specimen.

First Fee—Cash $15. Oct. 9, 1909.

" " —Cert.

Appl. filed complete Oct. 9, 1909.

Division of App. No. ——, filed ——, 190
Parts of Application Filed.

Examiner—Chas. C. Stauffer, Ex. Aug. 2, 1910.

Countersigned—H. B. Bursch,

For Commissioner.

Notice of Allowance Aug. 6, 1910.

Final Fee—Cash $20. Feb. 1, 1904.

" " —Cert.

Patented—February 28, 1911.

Associate Attorney—Wm. N. Cromwell,
1003 F. Street, N. W.,
Washington, D. C.

Attorney Lothrop & Johnson,
Pioneer Press Bldg.,
St. Paul, Minn.

(2) [213]

Arthur P. Lothrop. H. S. Johnson.

LOTHROP & JOHNSON,
Patent and Trade Mark Law,
Pioneer Press Building.

St. Paul, Minn., October 6, 1909.

Hon. Commissioner of Patents,
Washington, D. C.

Sir:

We enclose application papers in the application of David F. Shope for patent upon Method of Water Proofing Cement Blocks, together with our check for $15 to cover the Government filing fee.

Yours respectfully,
LOTHROP & JOHNSON.

$15 received.
Chief Clerk. U. S. Patent Office. 521796
1

(3) [214]

(1) 521,796 1
701 (Mail Room.
Oct. 9, 1909.
U. S. Patent Office.) 8606

PETITION.

To the Commissioner of Patents:

Your petitioner, David F. Shope, a citizen of the United States, residing at St. Paul, in the County of Ramsey and State of Minnesota, whose postoffice address is 20 E. 4th St., St. Paul, Minn., prays that Letters Patent may be granted to him for the improvement in

Method of Water Proofing Cement Blocks set forth in the annexed specification.

And he hereby appoints

Lothrop & Johnson,

Pioneer Press Building, St. Paul, Minnesota, a firm consisting of Arthur P. Lothrop and H. S. Johnson (Registered No. 4387 in the U. S. Patent Office), his attorneys, with full power of substitution and revocation, to prosecute this application, to make alterations and amendments therein, to receive the Patent, to sign the drawings and to transact all business in the Patent Office connected therewith.

Inventor must sign first given name in full.

DAVID F. SHOPE.

SPECIFICATION.

To All Whom It May Concern:

Be it known that I, David F. Shope, a citizen of the United States, residing at St. Paul, in the County of Ramsey and State of Minnesota, have invented certain new and useful improvements in Methods of Water Proofing Cement Blocks, of which the following is a specification.

10–9–09 521796

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(4) [215]

My invention relates to the method of forming water proof facing upon cement blocks without the use of special water proofing compounds and has for its object to provide a method of water proofing the exposed faces of the blocks in a cheap, simple, expeditious, and efficient manner.

Substitute A 1

(50) Cement blocks are ordinarily formed of a semi-dry mixture of sand and cement, and when formed and cured the block is a porous body with interstices, spaces, or pores between the particles of sand and cement. This gives it a surface to which mortar will adhere in wall construction, but which must be water proofed on its exposed face or faces to prevent the absorption of water. It has been customary to use for this purpose special water proofing compounds, which destroy perfect crystallization during the curing period, and which may discolor the block.

The present method consists in first forming the block in the ordinary manner by mixing sand and cement in a semi-dry state and pressing or tamping it in a mold. Water is then poured upon the face of the block until it is covered, and a powder of cement, either neat or mixed with sand or other ingredients, is sifted or otherwise spread upon the water, the water and cement mixture being at the same time agitated to carry it into the pores or interstices in the block to the required depth, and thoroughly to saturate the face thereof. The water serves both to carry the cement into the pores and to cause crystallization of the added cement. The face of the block is then stippled to roughen it as may be

desired, and the block is removed from the machine and cured in the usual manner.

It will be understood that the main portion of the block remains in a comparatively dry condition so that it can (5) [216] be easily removed from

10–9–09. 1. 521796
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8608

the machine, and all the faces except those exposed to the water and crystallizing mixture will be porous so that the mortar will adhere to them, while the outer face will be proof against the absorption of water because all of the interstices and pores have been filled with crystallized cement.

The word "block" is here used generically to include a brick, tile or other mass of any shape or size, as well as a "block" technically so called.

10–9–09 2. 521796
(6) [217] 4
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I claim as my invention:

Substitute A B 1

1. The herein described method of water proofing the faces of cement blocks which consist in first mixing cement and sand in a semi dry condition and molding it into blocks, then applying water upon the face of the block and spread- (ck.1)
ing dry cement thereon.
forming a water-

Per A

2. The herein described method of / ~~water-proofing~~ proof faced

" " ~~the faces of~~ cement block~~s~~ which consists in first
" " forming the block by mixing sand and cement in a semi dry state and molding it, then ~~pouring~~ applying
Per B A ~~poring~~ / water Λ ~~upon~~ the face of the block to
" " ~~until it is covered~~, then spreading cement upon the water and agitating the mixture to carry the cement into the interstices of the block to the required depth. Sigs.

3. The herein described method of water proofing
Per A the faces of cement blocks which consists in first molding cement and sand in a semi dry state, then covering the face of the block with water, then spreading cement upon the water and agitating the mixture, and then stippling the face of the block.

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In testimony whereof I affix my signature in presence of two witnesses:

Inventor MUST sign first given name in full.

DAVID F. SHOPE.

Witnesses:

EDWIN R. HOLCOMBE.

H. SMITH.

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OATH.

State of Minnesota,
County of Ramsey,—ss.

David F. Shope, the above-named petitioner, being duly sworn, deposes and says that he is a citizen of the United States and resident of St. Paul, Ramsey County, Minnesota, and that he verily believes himself to be the original, first and sole inventor of the improvement in

Method of Water Proofing Cement Blocks,

described and claimed in the annexed specification: that he does not know and does not believe that the same was ever known *of* used before his invention or discovery thereof; or patented or described in any printed publication in any country before his invention or discovery thereof, or more than two years prior to this application; or in public use or on sale in the United States for more than two years prior to this application; that said invention has not been patented in any country foreign to the United States on an application filed by him or his representatives or assigns, more than twelve months prior to this application; and that no ap-

plication for patent on said improvement has been filed by him or his representatives or assigns in any country foreign to the United States.

Inventor sign here—Sign first given name in full.

DAVID F. SHOPE,

Subscribed and sworn to before me this 5th day of October, 1909.

[Notarial Seal] E. R. HOLCOMBE,

Notary Public, Ramsey County, Minnesota.

My commission expires May 12, 1916.

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(8) [219]

AS

Div. 15 Room 308
Address only
The Commissioner of Patents,
Washington, D. C.

Paper No. 2
All communications respecting this application should give the serial number, date of filing, and title of invention.

DEPARTMENT OF THE INTERIOR.
UNITED STATES PATENT OFFICE
Washington, D. C.

Jan. 4, 1910.

David F. Shope,
c/o Lothrop & Johnson,
Pioneer Press Bldg.,
St. Paul, Minn.,

Stamp:
U. S. Patent Office
Jan. 4, 1910
Mailed
Division 15

Please find below a communication from the EXAMINER in charge of your application, for

Method of Water Proofing Cement blocks, filed Oct. 9, 1909, #521,796.

E. B. MOORE,
Commissioner of Patents.

This case has been examined.

Claims 1 and 2 are rejected on
Jaques, #748,611, Jan. 5, 1904, (25 – 1 P)
Haddock, #531,842, Jan. 1, 1895 "

Claim 3 is rejected on
Lake, #743,525, Nov. 10, 1903 "
Henderson, #886,124, Apr. 28, 1908 "

CHAS. C. STAUFFER,
Examiner.

OBR.

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(9) [220]

Mail Room, Serial No. 8611
Apr. 11, 1910.
U. S. Patent Office. Paper No. 3
A

IN THE UNITED STATES PATENT OFFICE.

Inventor: David F. Shope.

Subject: Method of Water Proofing Cement Blocks.

Filed October 9, 1909. Ser. No. 521,796. Room 308.

Hon. Commissioner of Patents,
Washington, D. C.

Sir:

I hereby amend the above-entitled application as follows in response to the Office Action of January 4th, 1910:

Cancel the specification and substitute therefor the following:

"My invention relates to the method of forming cement blocks having a water-proof facing, its
A 1 object being to water-proof the exposed face of the block without the application of external pressure or the use of special water-proofing compounds, and in such manner that the block can be immediately removed from the mold.

Cement blocks, as distinguished from cast stone, are usually formed by pressing or tamping in a mold a mixture of sand and cement in a damp or semi-dry state so that the blocks can be immediately removed from the mold. The block, when formed and cured, is a porous body with interstices, voids, or pores between the particles of sand and cement, to which mortar will adhere in wall construction, but which must be water-proofed on its exposed face to prevent the absorption of moisture.

Where a special water-proofing compound is used, it is apt to destroy perfect crystallization during the curing period as well as to discolor the block. And where a special water-proofing (10) [221] 4–11–10

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compound is not used, the surface to be water-proofed must be thoroughly wet in order that the cementitious material used for water-proofing shall enter the pores of the block and become thoroughly crystallized so as to form a perfect union. In the manufacture of what is called "cast stone," the

cement and aggregate (sand, marble dust and the like) is mixed to a flowing mass and cast in a mold, from which it cannot be removed until it has hardened and set, that is from three to ten or twelve hours, according to the temperature and set of the cement. It is impracticable to apply this liquid process to cement blocks by placing in the bottom of the mold a sloppy mixture of cementitious material and then forming the cement block upon it, because the block cannot be removed from the mold until the wet mixture has set, and the cementitious material will not enter the pores of the block except under pressure.

In the present method the block is first formed in the usual manner by mixing sand and cement in a slightly moist or semi-dry state, and pressing applied or tamping it in a mold. Water is next ~~poured~~ as by sprinkling to ~~upon~~ the face of the block in sufficient quantity enter the pores or interstices of the block to ~~cover it well,~~ and then a powder of cement, either neat or mixed with sand or other ingredients, is sifted ~~or otherwise spread~~ upon the water, which is at the same time agitated so as thoroughly to saturate the face of the block. The water will thus enter the pores or voids of the block to the required depth, and carry with it the cement powder sifted thereon. The water serves both to carry the cement into the pores and to cause crystallization of the added cement, and no external pressure will be required to force the water and cement into the

block. The face of the block is then stippled or otherwise treated as may be desired, and the block removed from the machine and cured in the usual manner.

It will be understood that the main portion of the

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(11) [222]

block remains in a comparatively dry state so that it can be immediately removed from the mold, and all its faces, except those exposed to the water and crystallizing mixture, will be porous so that the mortar will adhere to them, while the outer face will be proof against the absorption of water because all of the interstices and pores have been filled with crystallized cement.

The word "block" is here used generically to include a brick, tile or other mass of any shape or size, as well as a "block" technically so called. See 8609

Cancel claims 1 and 3 and substitute therefor the following claim:

A 2 Substitute B 1

"1. The herein described method of forming a water-proof faced cement block which consists in first mixing cement and sand in a semi-dry state and molding it into a block, next covering the face of the block with water and then sifting dry cement thereon, whereby the water will carry the added cement into the pores of the block without the application of external pressure."

In claim 2, lines 1 and 2, erase "water-proofing the faces of cement blocks" and substitute therefor "forming a water-proof faced cement block."

In claim 2, line 4, change "poring" to pouring.

NOTE.

The specification and claim 1 have been rewritten in order to bring out more clearly the characteristic novelty of applicant's invention and its differentiation from the prior art.

Lake and Henderson, which were cited against claim 3 drawn to the stippled face feature, described merely the ordinary cast stone process of pouring a wet, flowing mixture into a mold and letting it stand and set, and are therefore not in point except (12) [223] perhaps, as to the

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feature of stippling the face of the block. Claim 3 has, however, been cancelled as adding nothing of novelty to claims 1 and 2.

Jaques makes his facing by limiting the mold, and covering the top of the block, with a "cementitious slurry," or semi-fluid cement mixture, which is forced into the pores of the cement under pressure by means of a plunger or ram; and after that is done the mass must remain in the mould to set and harden, as in the cast stone process.

Jaques has to use external pressure to force the water from his slurry into the block because the slurry is mixed first and then applied. When so done the moisture will not carry the cement into

the pores except under pressure, in which case the mass must stand and set before it can be released, whereas in applicant's the water is put on first and the cement sifted on afterwards, so that the cement and water will be absorbed into the mass without the application of pressure, and will form a perfect bond.

Haddock's process does not form a waterproof outer facing, because he puts the outer stratum of the block at the bottom of the mold in a semi-dry state, or, as he says, in a "moist rather than wet condition" and builds up the block above it. There is not water enough in this stratum to fill the voids and make the facing waterproof. He is therefore obliged to interpose between this facing and the body of the block a special waterproof stratum B, which, of course, prevents moisture from penetrating the main mass A, but which does not secure a waterproof outer facing. Indeed, there is no object in his non-waterproof facing C except that, as it is in a semi-dry condition, it enables him to remove the block at once from the mold. Obviously, as Haddock places his facing C at the bottom of the mold it would not release when the mold is pulled away if it were not wet enough to become waterproof.

8615

Claim 2 is thought to be allowable as it stands and reconsideration is respectfully asked.

Applicant's process is essentially different from any of the references, and has gone into extensive and successful use, and is recognized by the trade as something distinctly new.

It is thought that the case is now in condition for allowance, which is respectfully asked.

Respectfully submitted,

DAVID F. SHOPE.

By LOTHROP & JOHNSON,

His Attorneys.

April 8th, 1910.

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5. 12

(14) [225]

Div. 15—Room 308. AS

Paper No. 4

All communications respecting this application should give the serial number, date of filing and title of invention.

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DEPARTMENT OF THE INTERIOR,
UNITED STATES PATENT OFFICE,
Washington, D. C.

Apr. 19, 1910.

David F. Shope,
c/o Lothrop & Johnson,
Pioneer Press Bldg.,
St. Paul, Minn.

U. S. Patent Office
Apr. 19, 1910.
Mailed.

Please find below a communication from the EX-

AMINER in charge of your application for METHOD OF WATER PROOFING CEMENT BLOCKS, filed Oct. 9, 1909, $521,796.

E. B. MOORE,
Commissioner of Patents.

This case considered as amended Apr. 11, 1910.

Claim 1 covers nothing beyond the ordinary process of laying cement sidewalks when the surface of the pavement is coated in whole or in part with water brought to the surface by tamping. It is accordingly rejected upon Haddock.

Claim 2 seems allowable.

CHAS. C. STAUFFER,
Examiner.

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13

(15) [226]

Paper No. 5.

Application Room,
Jun. 14, 1910.
U. S. Patent Office.

ASSOCIATE POWER OF ATTORNEY.

The Honorable Commissioner of Patents:

Please recognize WILLIAM NEVARRE CROMWELL, of 1003 F Street, N. W., Washington, D. C. Registry No. 241, as Associate Attorney in the prosecution of the application of DAVID F. SHOPE, filed October 9, 1909, Serial No. 521,796, for improvements in METHOD OF WATER-PROOFING CEMENT BLOCKS, with the usual powers, and address all communications relating thereto to him.

Signed at —— in the County of ——, and State of ——, this —— day of ——, 190—.

LOTHROP & JOHNSON.

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(16) [227]

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Serial No. Paper No. 6.

Application Room. B

Jun. 15, 1910.

U. S. Patent Office.

IN THE UNITED STATES PATENT OFFICE.

Before the Examiner.

Room No. 308.

In re Application of:

DAVID F. SHOPE,

METHOD OF WATER-PROOFING CEMENT BLOCKS.

Filed October 9, 1909.

Serial No. 521,796.

Hon. Commissioner of Patents,

Washington, D. C.,

Sir:

In response to Office action of April 19, 1910, the above-entitled application is hereby amended as follows:

Page 2 of the substitute specification, line 16 (page 2 of the amendment filed April 11, 1910) cancel "poured upon" and insert "applied, as by sprinkling, to."

Lines 16 and 17, cancel "cover it well" and insert "enter the pores of interstices of the block."

Redraw claim 1 as follows:

1. The herein described method of forming a water-proof faced cement block, which consists in
B–1 first forming the block of suitable material in a semi-dry state, applying water to the face of the block in a sufficient quantity to enter the pores or interstices thereof, and adding cement to the water, whereby the cement will enter the pores or interstices with the water."

Claim 2, line 4, change "pouring" inserted by amendment to "applying"; and also cancel "upon" add insert "to."

Same claim, lines 4 and 5, cancel "until it is covered."

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(17) [228]

8617

REMARKS.

The foregoing amendments are made pursuant to the understanding with Principal Examiner Stauffer during a personal interview.

Applicant has redrawn claim 1 in the light of the disclosure of the patents of record and the prior art cited by the Examiner, and it is clearly patentable thereover. The claim as now submitted is in the form in which it was presented during the interview above mentioned.

In support of this claim attention is respectfully directed to the fact that in applicant's process the forming of the block is done with the material in a semi-dry state, so that this material will have a certain degree of absorption, and will release from

the mould at once without first standing to dry and set. With the block in this condition, applicant then adds or applies water to the face of the block in such quantity that it will enter the pores or interstices of the block, and to the water adds cement, so that as the water enters the pores or interstices, it will also carry the added cement into the pores or interstices, so that this cement will fill the voids and become crystallized. This result is accomplished without the necessity of employing any external pressure to force the water and cement into the block, as is the case in the references, and differs essentially from a process where the material is put into the mould wet and the water in or under the same is brought to the surface by tamping, for in such case the block will not release from the mould without first standing for some time to dry and harden; neither will it have adequate absorptive power to absorb any added cement.

Claim 1 as now presented certainly defines a pro-

6–14–10 521796

2. 16

(18) [229]

cess which is materially different from the prior art cited by the Examiner, and patentably distinguishes therefrom, and allowance of this claim is respectfully requested.

WM. N. CROMWELL,
Associate Attorney.

Washington, D. C., June 14, 1910.

6–14–10. 521796

4. 17

(19) [230]

Address only
The Commissioner of Patents, O'D.
Washington, D. C.

2–181 Serial No. 521,796.

DEPARTMENT OF THE INTERIOR,
UNITED STATES PATENT OFFICE.
Washington.

August 6, 1910.

David F. Shope,
c/o Wm. N. Cromwell,
Washington, D. C.

Sir:–

Your APPLICATION for a patent for an IMPROVEMENT in

Method of Waterproofing Cement Blocks,

filed Oct. 9, 1909, has been examined and ALLOWED.

The final fee, TWENTY DOLLARS, must be paid not later than SIX MONTHS from the date of this present notice of allowance. If the final fee be not paid within that period the patent on this application will be witheld, unless renewed with an additional fee of $15, under the provisions of Section 4897, Revised Statutes.

The office delivers patents upon the day of their date, and on which their term begins to run. The printing, photolithographing, and engrossing of the several patent parts, preparatory to final signing and sealing, will require about four weeks, and such work will not be undertaken until after payment of the necessary fee.

In remitting the final fee give the serial number at the head of this notice.

Uncertified checks will not be accepted.

When you send the final fee you will also send, DISTINCTLY AND PLAINLY WRITTEN, the name of the INVENTOR and TITLE OF INVENTION AS ABOVE GIVEN, DATE OF ALLOWANCE (which is the date of this circular) DATE OF FILING, and, if assigned, the NAMES OF THE ASSIGNEES.

If you desire to have the patent issue to ASSIGNEES, an assignment containing a REQUEST to that effect, together with the FEE for recording the same, must be filed in this office on or before the date of payment of final fee. [231]

After issue of the patent uncertified copies of the drawings and specifications may be purchased at the price of FIVE CENTS EACH. The money should accompany the order. Postage stamps will not be received.

Final fees will NOT be received from other than the applicant, his assignee or attorney, or a party in interest as shown by the records of the Patent Office.

Respectfully,

E. B. MOORE,

Commissioner of Patents.

521796

(20) [232] 18

Address only Letter No.——
The Commissioner of Patents,
Washington D. C.
NBJ.

DEPARTMENT OF THE INTERIOR,
UNITED STATES PATENT OFFICE,
Washington.

(Mail Room
U. S. Patent Office
Feb. 10, 1911.)

January 28, 1911.

Messrs. Lothrop & Johnson,
910 Pioneer Press Bldg.,
St. Paul, Minn.

Gentlemen:

Check No. 10020 for $20.00 received from you today with final fee slip in the application of David F. Shope 521796, is herewith returned for signature.

Upon receipt of check properly signed the same will be applied as directed.

Respectfully,
W. F. WOOLARD,
Chief Clerk.

Enclosure.

521196
19.

(U. S. Mail Room
Jan. 28, 1911
U. S. Patent Office.)

MEMORANDUM
of
FEE PAID AT UNITED STATES PATENT OFFICE.

(Be careful to give correct Serial No.) G.
Serial No. 521,796. 191—
Inventor: David F. Shope.
Patent to be issued to———————————
Name of invention, as allowed: Method of Water Proofing Cement Blocks.
Date of Payment: January 26th, 1911.
Fee:
Final Ck. #10020 for $20, not countersigned.
Date of Filing: October 9, 1909.
Date of Circular of Allowance: August 6, 1910.

The Commissioner of Patents will please apply the accompanying fee as indicated above.

LOTHROP & JOHNSON,
Attorney.

Send patent to
David F. Shope, Esq.,
c/o Lothrop & Johnson,
910 Pioneer Press Bldg.
St. Paul, Minnesota.

521796
(22) [234] 20

Arthur P. Lothrop H. S. Johnson

LOTHROP & JOHNSON,
Patent and Trade Mark Law,
Pioneer Press Building,
St. Paul, Minn., January 30, 1911.

$20 received
CH. Feb. 11, 1911.
Chief Clerk U. S. Patent Office.
Hon. Commissioner of Patents,
Washington, D. C.
Sir:

Pursuant to your letter of January 28th, 1911, we have signed and return to you our check No. 10020 for $20 sent you for final fee in the application of David F. Shope, Serial No. 521,796. Please apply the check upon the final fee as directed in the slip previously sent you.

Yours respectfully,
LOTHROP & JOHNSON,
By ARTHUR P. LOTHROP.

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(23) [235]

Address only
"The Commissioner of Patents,
Washington, D. C."

2—191 Serial No. 521,796.

CVQ.

DEPARTMENT OF THE INTERIOR.
UNITED STATES PATENT OFFICE,
WASHINGTON.

February 4, 1911.

David F. Shope,
c/o Lothrop and Johnson,
St. Paul, Minn.

(Stamp) Patent Will Issue
Feb. 28, 1911.

Sir:

You are informed that the final fee of TWENTY DOLLARS has been received in your application for Improvement in

Method of Water Proofing Cement Blocks,

Date of receipt—Feb. 1, 1911.

Very respectfully,

E. B. MOORE,
Commissioner of Patents.

521796
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(24) [236]

United States District Court, District of Washington, Southern Div'n.

Mail Room.

Jul. 9, 23.

U. S. Patent Office.

Honorable Commissioner of Patents,
Washington, D. C.

Sirs:—

In compliance with the Act of February 18, 1922 (41 Stat. L.——), you are advised that there was filed on the 2nd day of July, 1923, in this court an action, suit, or proceeding No. 171–E, entitled:

NAME—Shope Brick Company, a Corp., Plaintiff,
ADDRESS—Portland, Oregon,

versus

NAME—Warren L. & Ray L. Smith, Name & Style "Smith Bros." Defendant,
ADDRESS—Tacoma, Wash., 3202 Delin St.

brought upon the following patents:

Patent No.	Date of Patent.	Patentee
1. 985709	Feby. 28, 1911	David F. Shope
2. 1270450	June 25, 1918	Do.
3.		
4.		
5.		

In the above-entitled case, on the —— day of ——, 192—, the following patents have been included by —— (insert amendment, answer, cross-bill, or other pleading):

Patent No.	Date of Patent.	Patentee
1.		
2.		
3.		
4.		
5.		

In the above-entitled case the following decision [237] has been rendered or decree issued:

IN WITNESS WHEREOF, I have affixed my hand this 2nd day of July, 1923, at Tacoma Washton.

ED M. LAKIN,
Deputy Clerk of Said Court.

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(25) [238]

UNITED STATES PATENT OFFICE

DAVID F. SHOPE, of St. Paul, Minnesota.

Method of Waterproofing Cement Blocks.

985,709 Specification of Letters Patent.
Patented Feb. 28, 1911.

No Drawing. Application filed October 9, 1909.
Serial No. 521,796.

To all whom it may concern:

Be it known that I, David F. Shope, a citizen of the United States, residing at St. Paul, in the County of Ramsey and State of Minnesota, have invented certain new and useful Improvements in Methods of Waterproofing Cement Blocks of which the following is a specification.

My invention relates to the method of forming cement blocks having a water-proof facing, its ob-

ject being to water-proof the exposed face of the block without the application of external pressure or the use of special water-proofing compounds, and in such manner that the block can be immediately removed from the mold.

Cement blocks, as distinguished from cast stone, are usually formed by pressing or tamping in a mold a mixture of sand and cement in a damp or semi-dry state so that the blocks can be immediately removed from the mold. The block, when formed and cured, is a porous body with interstices, voids, or pores between the particles of sand and cement to which mortar will adhere in wall construction, but which must be water-proofed on its exposed face to prevent the absorption of moisture.

Where a special water-proofing compound is used, it is apt to destroy perfect crystallization during the curing period as well as to discolor the block. And where a special water-proofing compound is not used, the surface to be water-proofed must be thoroughly wet in order that the cementitious material used for water-proofing shall enter

the pores of the block and become thoroughly crystallized so as to form a perfect union. In the manufacture of what is called "cast stone," the cement and aggregate (sand, marble dust and the like) is mixed to a flowing mass and cast in a mold, from which it cannot be removed until it has hardened and set, that is from three to ten or twelve hours, according to the temperature and set of the

cement. It is impracticable to apply this liquid process to cement blocks by placing in the bottom of the mold a sloppy mixture of cementitious material and then forming the cement block upon it, because the block cannot be removed from the mold until the wet mixture has set, and the cementitious material will not enter the pores of the block except under pressure.

In the present method the block is first formed in the usual manner by mixing sand and cement in a slightly moist or semi-dry state, and pressing or tamping it in a mold. Water is next applied, as by sprinkling, to the face of the block in sufficient quantity to enter the pores or interstices of the block, and then a powder of cement, either neat or mixed with sand or other ingredients, is sifted upon the water, which is at the same time agitated so as thoroughly to saturate the face of the block. The water will thus enter the pores or voids of the block to the required depth, and carry with it the cement powder sifted thereon. The water serves both to carry the cement into the pores and to cause crystallization of the added cement, and no external pressure will be required to force the water and cement into the block. The face of the block is then stippled or otherwise treated as may be desired, and the block removed from the machine and cured in the usual manner.

It will be understood that the main portion of the block remains in a comparatively dry state so that it can be immediately removed from the mold, and

all its faces, except those exposed to the water and

(26) [240]

crystallizing mixture, will be porous so that the mortar will adhere to them, while the outer face will be proof against the absorption of water because all of the interstices and pores have been filled with crystallized cement.

The word "block" is here used generically to include a brick, tile or other mass of any shape or size, as well as a "block" technically so called.

I claim as my invention:

1. The herein described method of forming a water-proof faced cement block, which consists in first forming the block of suitable material in a semi-dry state, applying water to the face of the block in a sufficient quantity to enter the pores or interstices thereof, and adding cement to the water, whereby the cement will enter the pores or interstices with the water.

2. The herein described method of forming a water-proof faced cement block which consists in first forming the block by mixing sand and cement in a semi-dry state and molding it, then applying water to the face of the block, then spreading cement upon the water and agitating the mixture to carry the cement into the interstices of the block to the required depth.

IN TESTIMONY WHEREOF I affix my signature in presence of two witnesses.

DAVID F. SHOPE.

Witnesses:

EDWIN R. HOLCOMBE.

H. SMITH. [241]

25/1.

R. 1909.

CONTENTS:

Print ————.

1. Application 1 Papers—One.
2. Rej. Jan. 14, 1910.
3. Amend A. April 11, 1910.
4. Rej. Apr. 19, 1910.
5. Asso. Power of Atty. June 14, 1910.
6. Amendt. B, June 14, 1910.

Notice of Suit July 9, '23.

TITLE:

Method of Waterproofing Cement Blocks.

Oct. 23, 1923.

#167405/23.

Filed April 4, 1924. G. M. Marsh, Clerk.

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(27) [241A]

DEFENDANT'S EXHIBIT "F."

UNITED STATES PATENT OFFICE.

EDWARD GOODE, OF BARTOW, FLORIDA, ASSIGNOR OF ONE-HALF TO THOMAS A. GOODE, OF SAME PLACE.

ARTIFICIAL STONE

SPECIFICATION forming part of Letters Patent No. 518,239, dated April 17, 1894.

Application filed August 30, 1893. Serial No. 484,390. (No specimens.)

To all whom it may concern:

Be it known that I, EDWARD GOODE, a citizen of the United States, residing at Bartow, in the county of Polk and State of Florida, have invented certain new and useful Improvements in Artificial Stone for Monuments, &c.; and I do hereby declare the following to be a full, clear, and exact description of the invention, such as will enable others skilled in the art to which it appertains to make and use the same.

My invention consists of an artificial stone especially adapted for use in the making of monuments,—and in the process of making the same. For the main portion, or body of the stone I employ clean white sand, or marble dust, entirely freed from soil or other foreign substance, and pure Portland cement, the proportions of these ingredients being from one to two parts of sand to one part of the cement. These ingredients I thoroughly mix in a dry condition, and then add thereto sufficient water to make a stiff mortar, which when of the desired and of a uniform consistency, is placed in the mold which gives the desired shape to the article being made. When the mold is full, and the surface is properly dressed to give the desired smoothness of surface, it is allowed to stand for a few minutes so that the water will gather upon the surface. I then sift pure cement upon the surface, which may be smoothed if desired after the cement has been placed thereon, and then allow it to stand until the water again collects, after which cement is again evenly and uniformly sprinkled upon the surface, and this operation is repeated several times. The mold containing the above described composition is now left for a suitable length of time, usually for about twenty-four hours, to harden. When sufficiently hard, but while yet moist, I saturate the surface with a strong solution of lime-water, care being taken to remove, by a soft rag or sponge, any surplus lime which may collect upon the surface. This saturation is repeated as often as may be necessary during two or three days and until the surface portion of the artificial stone becomes thoroughly saturated with the lime-water.

It will be observed that I do not use lime in the composition of the body-portion of the artificial stone, as I have found that this is objectionable for the reason that when lime is used the body of the stone is caused to crack by reason of the shrinkage of the lime in the process of drying, whereas when the body of the stone is made only of sand and pure cement, as described, this cracking is avoided, and a more uniform, solid and durable stone is the result. It will also be noticed that upon the body-portion of the stone is formed a skin or surface portion of pure cement. This I find to be very advantageous in that it makes a surface of great hardness, and to which can be imparted a smoothness of finish which cannot be obtained with the composition which makes up the body of the stone. A stone having the surface thus prepared is especially adapted to receive clean or clearly cut impressions from letters or other designs which may be laid thereon, and therefore is especially useful in the making of monuments upon which it is desired to place inscriptions.

In order to make the impressions in the surface, I use dies or type shaped to form letters, figures or other desired designs, and place them upon the surface of the stone, and cause them to be embedded therein to the desired extent by slight pressure.

I find that by treating the surface of the artificial stone, produced as above described, and while it is still moist, with lime-water, a marble-like effect is produced which adds much to the appearance of the stone. The whiteness which is imparted to the stone by the lime contained in the lime-water is of a lasting quality and is not affected by exposure to the weather.

In the making of monuments or other articles from the composition which I have described, I ordinarily prefer to fill the molds about half full with the composition of sand and cement, and then place in the molds iron rods, which being embedded in the article, give strength thereto without impairing its appearance.

Any suitable tools may be employed for the finishing of the surface of the stone, both be-

fore the surface coating is applied thereto, and after such surface coating has been placed thereon.

It will be understood that a desirable artificial stone is produced without the treating of the surface with the lime-water, although I prefer this step as it improves the appearance of the finished article.

Having thus described my invention, what I claim, and desire to secure by Letters Patent, is—

1. An artificial stone having a body portion of sand and hydraulic cement, and a skin of pure cement impregnated with lime, whereby the skin portion of the stone has a permanent, white, marble-like appearance, substantially as set forth.

2. The herein described process of making artificial stone, which consists in mixing together pure sand and Portland cement with sufficient water to make a thick mortar, then molding this composition, then forming a surface by sifting or placing thereon dry hydraulic cement, and then finishing the said surface, substantially as set forth.

3. The herein described process of making artificial stone, which consists in forming a body of a mixture of sand, hydraulic cement and water, then applying thereto a surface or skin of pure hydraulic cement, allowing the stone thus formed to harden, and then treating the surface with lime-water, while the stone is yet moist, substantially as set forth.

In testimony whereof I affix my signature in presence of two witnesses.

EDWARD GOODE.

Witnesses:
FRANCIS A. WOLFF,
S. M. TATUM.

DEFENDANT'S EXHIBIT "G."

(No Model.)

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A. FEDERICI.

BUILDING BLOCK.

No. 527,416. Patented Oct. 16, 1894.

Fig 1

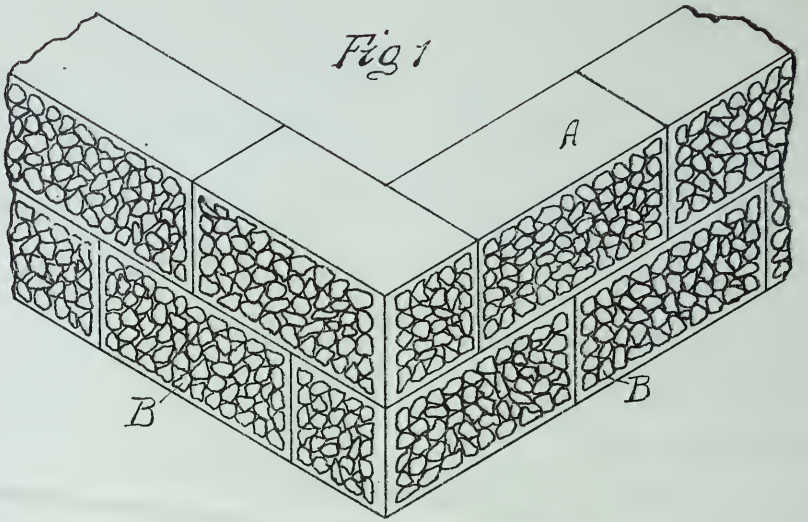


Fig 2

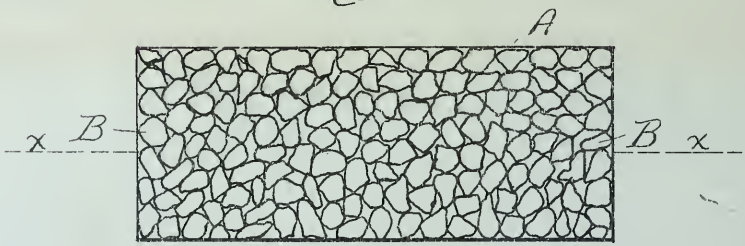
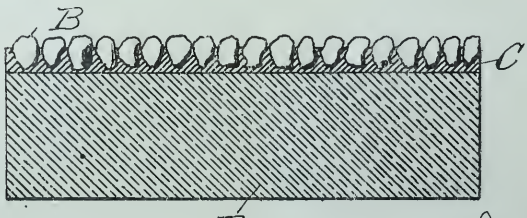


Fig 3



Witnesses
Alfred B. Watson
William M Drew

Inventor
Antonio Federici
By John F. Kerr
Attorney

UNITED STATES PATENT OFFICE.

ANTONIO FEDERICI, OF PATERSON, NEW JERSEY.

BUILDING-BLOCK.

SPECIFICATION forming part of Letters Patent No. 527,416, dated October 16, 1894.

Application filed March 30, 1893. Serial No. 468,261. (No model.)

To all whom it may concern:

Be it known that I, ANTONIO FEDERICI, a citizen of the United States, residing at Paterson, in the county of Passaic and State of New Jersey, have invented certain new and useful Improvements in Building-Blocks; and I do declare the following to be a full, clear, and exact description of the invention, such as will enable others skilled in the art to which it appertains to make and use the same, reference being had to the accompanying drawings, and to the letters of reference marked thereon, which form a part of this specification.

The object of my invention is to provide an artificial stone for building purposes which shall be durable and ornamental and which can be cheaply and easily manufactured.

The invention consists of a stone comprising the following elements: cement, sand, and pebbles, arranged as hereinafter described and shown in the accompanying drawings.

In the drawings Figure 1 represents the corner of a wall built with my artificial stone. Fig. 2 represents the face of a stone showing the pebbles. Fig. 3 is a view of a section of my artificial stone through the line X—X, Fig. 2.

—A— represents the stone; —B— the pebbles; —C— a layer of pure cement, and —D— represents the other portion of the stone which is composed of cement and sand.

The portion —D— of the stone is composed of Portland cement and the best sharp sand, which I mix in suitable proportions and make or mold in any suitable size or shape. I then prepare some pure Portland cement and spread a layer thereof upon that exposed surface of the portion —D— which is to form the face of the stone. While the material is yet plastic, assorted pebbles, B, are partially sunk into the central part of the face or faces of the stone, a margin on said face being left unpebbled as clearly shown in Fig. 1, although it is obvious that the whole surface, as shown in Figs. 2 and 3, may be covered without departing from the spirit of my invention. The block is then left until it hardens.

Fig. 3 shows the composition of my artificial stone, —D— being the portion composed of cement and hard sand, —C— being the layer of pure cement and —B— being the pebbles partially embedded therein.

When the stone is thoroughly dry and hardened the pebbles —B— cannot be extracted from the layer of cement —C— without breaking them.

I propose to use my artificial stone for building purposes for which it is peculiarly adapted, as the action of the weather produces no ill effect upon it; but by bleaching the pebbles rather enhances its beauty.

I am aware that in the construction of pavements, roadways, and walking surfaces, that gravel, sand and cement have been used for uniting the blocks or cobble-stones and that in some instances materials distinguished for their sharp, hard and angular and gritty character have been used in an artificial stone or a concrete walking surface, in order to prevent slipping, &c., and in other cases where metallic gratings have been combined with an under or body of cement or concrete; but I am not aware that a building block has ever been constructed with exposed surfaces consisting of very small pebbles partially embedded in a layer of pure cement.

I am also aware of a building block formed of a cement or concrete body with pieces of tiling, glass or other hard substances embedded therein flush with the surface of the sand; but in my stone the pebbles are very small and are only partially embedded in the layer of cement upon the exposed surfaces thereof.

I am also aware that it is not new to form a block for paving streets by covering a layer of bricks with cement and embedding therein a surface layer of cobble-stones of suitable size for resisting the wear incident to heavy traffic.

As I do not confine myself to pebbles of any particular color it is obvious that in ornamental trimmings on buildings, the arches, sills or cornices may be of variegated colors; and as I do not confine myself to any special shape, my artificial stone may be used in all sorts of mason work for walls, dwellings or other buildings, in all cases the faces or exposed portions of my stone being constructed

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substantially as above specified with pebbles, partially embedded in a layer of pure cement on said faces.

With the above description of my invention, what I claim is—

A new article of manufacture consisting of a building block, the body portion of which is composed of a comparatively coarse material, the face or exposed surface being composed of finer material, such as Portland cement, into the surface of which pebbles, of substantially uniform size, are partially embedded, substantially as and for the purpose set forth.

In testimony whereof I affix my signature in presence of two witnesses.

ANTONIO FEDERICI.

Witnesses:
G. J. KERR,
W. M. DREW.

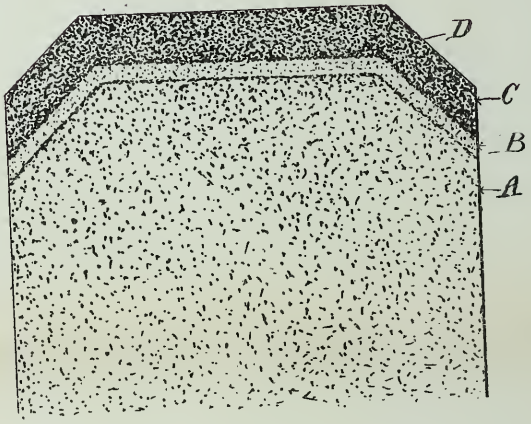
DEFENDANT'S EXHIBIT "H."

(No Model.)

W. J. HADDOCK.

PROCESS OF CONSTRUCTING HYDRAULIC CEMENT BLOCKS OR ASHLERS.

No. 531,842. Patented Jan. 1, 1895.



Witnesses
C. E. Burdine.
G. Arthur Pennington.

Wm J. Haddock, Inventor
by Crosby & Gorian
Attorneys

UNITED STATES PATENT OFFICE.

WILLIAM J. HADDOCK, OF IOWA CITY, IOWA.

PROCESS OF CONSTRUCTING HYDRAULIC CEMENT BLOCKS OR ASHLERS.

SPECIFICATION forming part of Letters Patent No. 531,842, dated January 1, 1895.

Application filed May 28, 1894. Serial No. 512,689. (No specimens.)

To all whom it may concern:

Be it known that I, WILLIAM J. HADDOCK, a citizen of the United States, residing at Iowa City, in the county of Johnson and State of Iowa, have invented a certain new and useful Process of Constructing Hydraulic Cement Blocks or Ashlers; and I do hereby declare the following to be a full, clear, and exact description of the invention, such as will enable others skilled in the art to which it appertains to make and use the same.

This invention relates to a new and useful process of constructing hydraulic cement blocks or ashlers for the purpose of constructing or veneering walls of buildings, and it consists in the several steps hereinafter referred to and definitely pointed out in the claims.

Heretofore in the construction of cement blocks or ashlers for building purposes it has been deemed impossible to form the same by using natural hydraulic cements in conjunction with artificial or Portland cement and at the same time secure the requisite compactness and strength. It is further a well-known fact that, as heretofore made, of hydraulic cement, blocks where exposed to the elements will absorb a large amount of water, making the structure composed of them wet and cold.

The aim and purpose of this invention is to overcome such defects incident to the construction of hydraulic cement blocks or ashlers adapted for use in building or veneering purposes, by combining natural and artificial cement in one and the same block, but in different strata so that the artificial cement will be the surface for exposure, the natural cement forming the protected part of the block, thus combining great strength and economy.

In the accompanying drawing I have shown a cross-section of a preferred form of block as made by my method.

In said drawing A represents the protected part or base of the block formed of natural cement and sand.

B represents the water-proof stratum of hydraulic cement free from sand, and C represents the outer stratum or facing of the block, composed essentially of artificial or Portland cement and fine sand.

The outer corners of the blocks are chamfered as at D, each stratum being likewise constructed so that the outer stratum C is extended back partly over the sides of the stratum A. By this means when the block is used for building purposes or for building walls the outer face will simulate that of cut stone while the edges of the inner stratum A will be fully protected. By this means I am also enabled to economize in the use of artificial cement.

The method I employ in constructing these blocks is as follows:—I first take a suitable mold of the proper shape and size and of strength sufficient to withstand considerable internal pressure. The block or ashler is then built up, starting at the top first, that is to say, I first place in the bottom of the mold a stratum of Portland cement mixed with sand in the proportion of substantially one volume of cement to two volumes of sand. This amount, however, may be varied. This mass of cement and sand is thoroughly mixed and then moistened by incorporating therewith a sufficient amount of water to moisten each particle of sand and cement, leaving the mass in a moist rather than wet condition. I employ the term "moist" and wish it understood as designating a damp condition rather than a condition approximating a fluid or wet condition. The mass so treated is then thoroughly tamped and compressed, the "moist" condition of the mass preventing the water from oozing out as would be the case were the mixture over-saturated with the water. The material thus tamped becomes solid and firm. In so tamping and compressing the inner section of the block is first treated to form the concave under face as represented in the drawing. I next sift or spread on the exposed face of the compressed material a coating of pure cement, either natural or artificial. I then moisten this coating. The amount of material used in this step is sufficient to form a complete coating or covering and it constitutes a stratum impervious to water. I next take a mixture of natural cement and sand and incorporate therein a sufficient amount of water to moisten each grain thereof so that the mass will compact easily and thoroughly without the water rising or exuding. The proportions of sand and cement are one volume of cement to two volumes of sand. This amount may, however, be slightly varied. The material so mixed is then placed in the

mold over the strata of pure cement and thorough and absolute compression is placed on all parts thereof to form a solid and firm block. The mold is now inverted on a level plank or plain surface and is then removed from the block which will retain its shape and the cement is allowed to set.

It is evident that slight variations in the method described and in the article shown can be made without departing from the nature and principle of my invention.

Having thus described the invention, what is claimed as new, and desired to be secured by Letters Patent, is—

1. The method of forming building blocks or ashlers consisting in placing a "moist" mass of artificial cement and sand into the bottom of a suitable mold, thoroughly compressing the same to form a compact outer stratum or facing, coating the exposed face of the stratum with a stratum of pure hydraulic cement, placing a mass of natural hydraulic cement and sand in a mixed moist condition onto the stratum of pure cement, thoroughly compressing the same and finally removing the block from the mold and allowing the cement to set, substantially as described.

2. The method of forming building blocks or ashlers, consisting in placing a moist mass of cement and sand into a suitable mold, compressing the same, applying a coating of pure cement to the exposed face of the material in the mold, placing a moist mass of hydraulic cement and sand on the coating, compressing the same, and finally removing the block from the mold, substantially as described.

In testimony whereof I affix my signature in presence of two witnesses.

WILLIAM J. HADDOCK.

Witnesses:

FRANK T. BREENE,

GEORGE TOMLIN.

DEFENDANT'S EXHIBIT "L."

No. 703,644. Patented July 1, 1902.

E. DAVIES.

METHOD OF MAKING CEMENT FENCE POSTS.

(Application filed May 29, 1901.)

(No Model.)

Fig. 1.

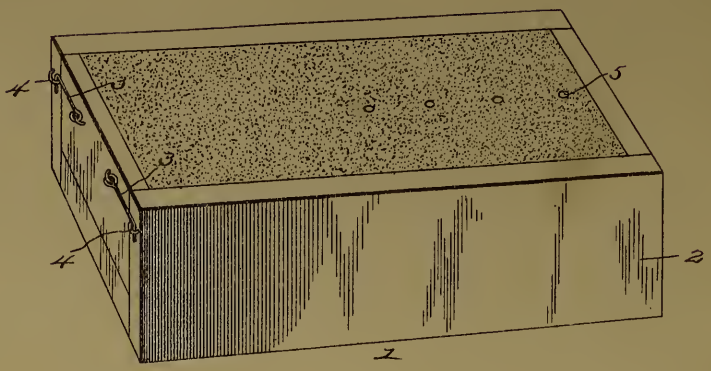
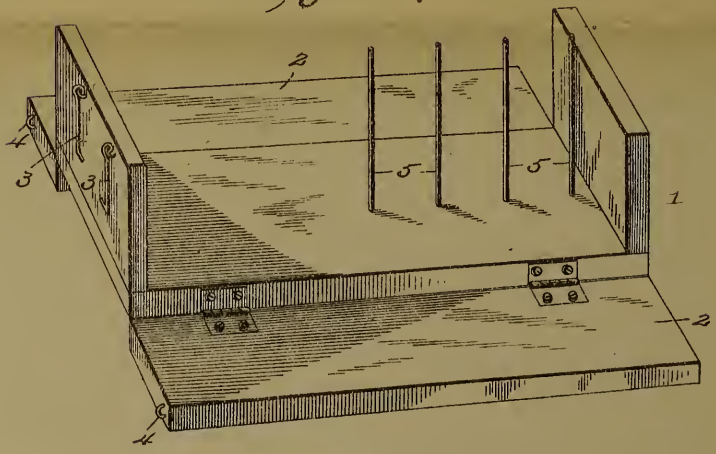


Fig. 2.



E. Davies, Inventor.

By E. G. Siggers.

Attorney.

Witnesses.
L. Chesser,
R. M. Elliott.

UNITED STATES PATENT OFFICE.

EDWARD DAVIES, OF READING, MICHIGAN.

METHOD OF MAKING CEMENT FENCE-POSTS.

SPECIFICATION forming part of Letters Patent No. 703,644, dated July 1, 1902.

Application filed May 29, 1901. Serial No. 62,385. (No specimens.)

To all whom it may concern:

Be it known that I, EDWARD DAVIES, a citizen of the United States, residing at Reading, in the county of Hillsdale and State of Michigan, have invented a new and useful Method of Making Cement Fence-Posts, of which the following is a specification.

This invention relates to a method of making cement fence-posts.

The object of the invention is in a certain, ready, and thoroughly practical manner and without adding to the expense of the production of the post to preclude entrance of moisture to the post, whereby hardening will be accelerated and destruction due to disintegration from entrance of moisture will be effectively obviated.

A method heretofore commonly practiced for shielding the post from the action of moisture has been to dust the post while in the mold with cement, and this, by absorbing moisture from the post, will become associated therewith and form a film merely on one side thereof, or at most on a side, the edges, and two ends, thus leaving the remaining side unprotected. While a fence-post treated in this manner will be effective for use in climates where there is but little moisture and but little frost, yet in higher latitudes it would be practically inoperative for effective use, for the reason that if moisture enters or is taken up by the post and this moisture becomes congealed by cold, disintegration of the post is inevitable.

Under the procedure set forth in my invention I provide a protecting envelop or film that entirely covers every particle of the exposed surface of the post, so that in the event of its being set up before the interior is thoroughly dry it will still be protected against entrance of moisture, thereby permitting it in time to set and become perfectly hard and firm.

As demonstrating one way of carrying my invention into effect, I have exhibited in the accompanying drawings a form of mold that may be employed in carrying the invention into effect, it being understood that the invention is not to be restricted to any particular shape of post or any particular shape of mold, as it is equally well adapted to posts of any contour that may be desired, and in the drawings—

Figure 1 is a view in perspective exhibiting the mold with the sides folded up, displaying the post in position therein. Fig. 2 is a similar view with the sides turned down to permit the removal of the posts.

In carrying my invention into effect I fill the mold 1, which may be, as before stated, of any preferred shape, with a mass of damp sand, gravel, and cement mixed in suitable proportions to produce the best results, and this composition is pounded into the mold to cause a close adherence of the molecules of the composition, the sides 2 of the mold being closed up, as shown in Fig. 1, and held in this position by hooks 3 engaging staples 4 on the sides. To present the proper openings or holes through which the wires are passed for securing the fence-wires in position against the post, I associate with the mold a plurality of bars of metal 5, these to be of the required diameter to present the openings desired. When the composition has become sufficiently set to permit of the post being handled without danger of breaking and before it has become finally set, the sides of the mold are let down and the post is removed from the mold and dipped into a bath of pure liquid Portland cement of such fluidity as that it will run smoothly and evenly over the entire exposed surfaces of the post and fill all cracks, crevices, and interstices, except the openings left by the bars 5, the walls of which openings are likewise coated with a film of the cement. By reason of the fact that the cement is in liquid form it will rapidly dry and thereby present upon all of the exposed surfaces of the post an envelop or film of moisture-proof material. Should it be found that one dipping of the post is not sufficient, although it generally will be, it may be dipped one or more times, the point being in either event to effect a perfect closure of any opening that may exist upon the exposed surfaces of the post. The post is then set aside until the coating shall have become thoroughly dried, and the posts may then be set in place for use. When so set up, it will be immaterial to what moisture it is exposed, as such moisture cannot gain entrance to the interior of

the post, and in time the post will become thoroughly set and, as will be readily understood, increase in hardness with age.

Heretofore fence-posts have been given a surface coating by applying the surfacing material by means of a brush or otherwise smearing said material upon the post. This is a laborious operation, requiring considerable time and resulting in an unequal and unsatisfactory surfacing of the post. In view of this disadvantage it is the essential object of my invention to secure a uniform protective surfacing in an expeditious and thoroughly practical manner by dipping the post in a bath of liquid cement, which operation may be quickly carried out and results in a uniform coating without requiring the employment of skilled labor and also without particular attention upon the part of the operator.

It will be seen from the foregoing description that the method herein described will not add any material expense to the production of the post, and by reason of the fact that the life of the post will be indefinitely increased its use will be highly beneficial in the manufacture of posts of this character, rendering them, in effect, indestructible.

From the foregoing it is thought that the construction, operation, and many advantages of the herein-described invention will be apparent to those skilled in the art without further description, and it will be understood that various changes in the size, shape, proportion, and minor details of construction may be resorted to without departing from the spirit or sacrificing any of the advantages of the invention.

What I claim is—

The herein-described method of making fence-posts, consisting in placing plastic material in a mold, permitting the same to remain therein until it has become hard enough to handle without breaking, then removing the molded material from the mold before it has become entirely set, and finally dipping the article one or more times in a bath of liquid hydraulic cement.

In testimony that I claim the foregoing as my own I have hereto affixed my signature in the presence of two witnesses.

EDWARD DAVIES.

Witnesses:
A. L. KINNEY,
F. R. ROBSON.

DEFENDANT'S EXHIBIT "V."

A. O. THOMAS.

PROCESS OF MOLDING ARTIFICIAL STONE BUILDING BLOCKS.

APPLICATION FILED OCT. 12, 1907.

958,194. Patented May 17, 1910.

FIG. 1.

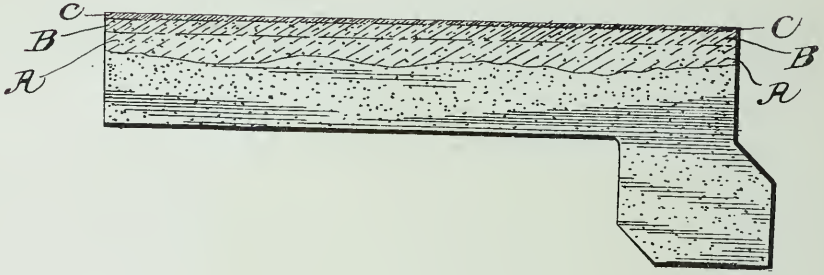
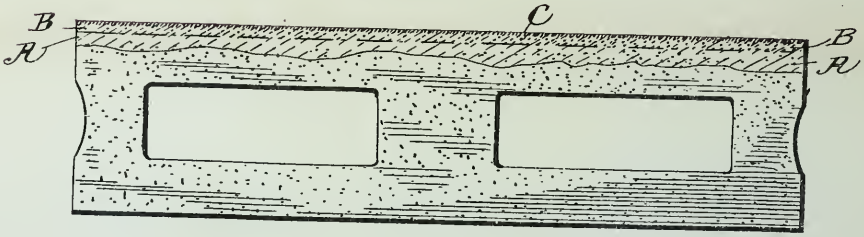


FIG. 2.



WITNESSES

Chas. K. Davis.

Myron A. Clear

INVENTOR

Augustus O. Thomas.

by P. L. Parker

Attorney

UNITED STATES PATENT OFFICE.

AUGUSTUS O. THOMAS, OF KEARNEY, NEBRASKA.

PROCESS OF MOLDING ARTIFICIAL-STONE BUILDING-BLOCKS.

958,194. Specification of Letters Patent. Patented May 17, 1910.

Application filed October 12, 1907. Serial No. 397,221.

To all whom it may concern:

Be it known that I, AUGUSTUS O. THOMAS, a citizen of the United States, residing at Kearney, in the county of Buffalo and State of Nebraska, have invented certain new and useful Improvements in Processes of Molding Artificial-Stone Building-Blocks, of which the following is a specification.

My invention relates to a new and improved process of molding artificial stone building blocks and the like, and particularly contemplates the provision of a process whereby the block may be molded and handled at once, and whereby its usefulness and strength will be equal to that of a wet mold block which could not be handled before twenty-five or thirty-six hours.

My invention further and specifically resides in the following process of molding artificial stone building blocks as will be hereinafter particularly described with reference to the accompanying drawings forming a part of this specification, in which—

Figure 1 is a plan view partly in section of a building block constructed according to my process, and Fig. 2 is a similar view of a modified form of building block constructed in accordance with my process.

According to my invention I aim to provide a building block comprising a body A composed of coarse aggregates and a comparatively small percentage of moisture, being thus made in low plasticity which gives the opportunity of handling the product immediately. The face B of this block comprises a mixture of finely divided aggregates formed in a state of high plasticity, that is with moisture sufficient to render the same into a thoroughly plastic mass. Making the body A of the block of low plasticity and the face B of a high plasticity, gives an opportunity of working the material and at the same time bringing out the virtues of the cement and making the block of sufficient moisture in the mixture, to produce perfect crystallization and to produce stone instead of merely cemented sand and gravel. This block is floated with some pressure which closes the pores in the cement to further the opportunity of working the material properly and the surface is preferably sifted over with finely crushed marble or stone C properly mixed with Portland cement to produce a beautifying crystallized effect.

The addition of the powdered marble or other stone mixed with cement serves the immediate purpose of forming a very thin outside layer on the face of high plasticity preventing, by a thickening or stiffening action, the surface tendency to run, due to the oozing of the water to the surface, and thereby enables the block to be handled and used considerably earlier than would be otherwise possible. The powder further serves to prevent the escape of moisture from the face of high plasticity either by drip or evaporation.

When a mixture is made very dry as heretofore in molding blocks, it is hard to get sufficient water to produce perfect crystallization, while the facing of high plasticity provided by my process uses all the water that is necessary for perfect crystallization.

Having thus fully described my invention, I claim:

An improvement in making building blocks, which consists in forming the body portion thereof, of a mixture of coarse aggregates made in low plasticity, in forming a facing for the outer side of said body portion of a mixture of finely divided aggregates in high plasticity for furnishing sufficient moisture for the crystallization of said body portion, and in forming on the surface of said facing a thin layer in low plasticity by sifting on such surface powdered stone and cement to stiffen the surface of the facing and prevent the escape of moisture therefrom, substantially as described.

In testimony whereof I affix my signature in presence of two witnesses.

AUGUSTUS O. THOMAS.

Witnesses:
S. L. GARRETT,
VIRGINIA MERCER.

DEFENDANT'S EXHIBIT "W."

No. 751,089. PATENTED FEB. 2, 1904.

F. A. MALETTE.

METHOD OF MAKING CONCRETE BUILDING BLOCKS.

APPLICATION FILED APR. 17, 1903.

NO MODEL. 3 SHEETS—SHEET 1.

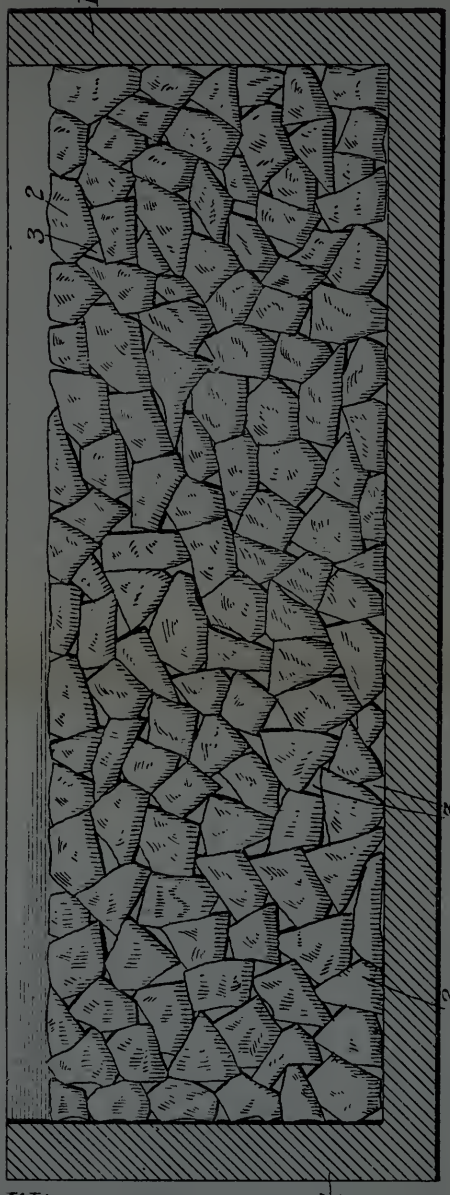


Fig. 1.

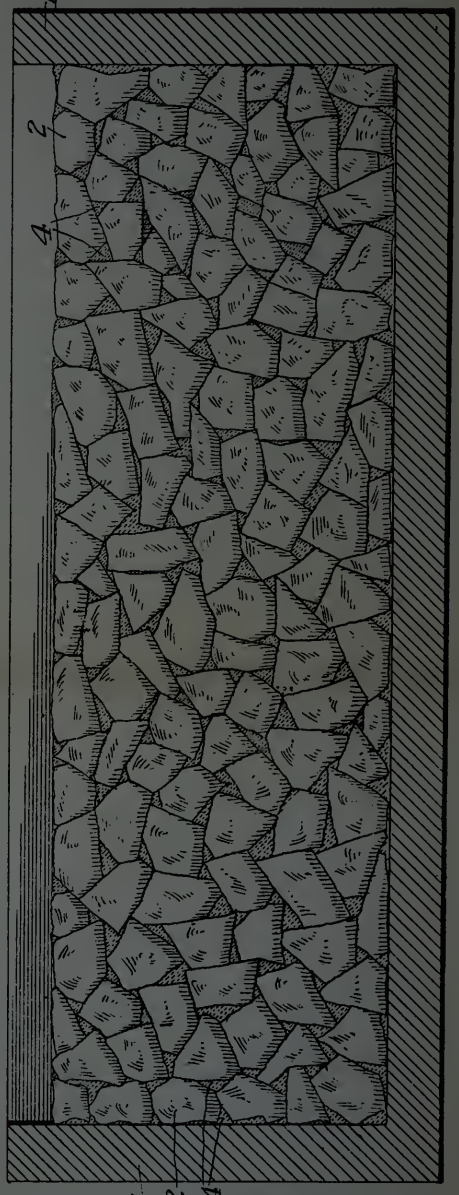


Fig. 2.

Witnesses:
C. B. Harbarger
H. L. Snyder

Inventor:
Frederick A. Malette.
by Thos. Stockbridge
Atty.

No. 751,089. PATENTED FEB. 2, 1904.

F. A. MALETTE.

METHOD OF MAKING CONCRETE BUILDING BLOCKS.

APPLICATION FILED APR. 17, 1903.

NO MODEL. 3 SHEETS—SHEET 2.

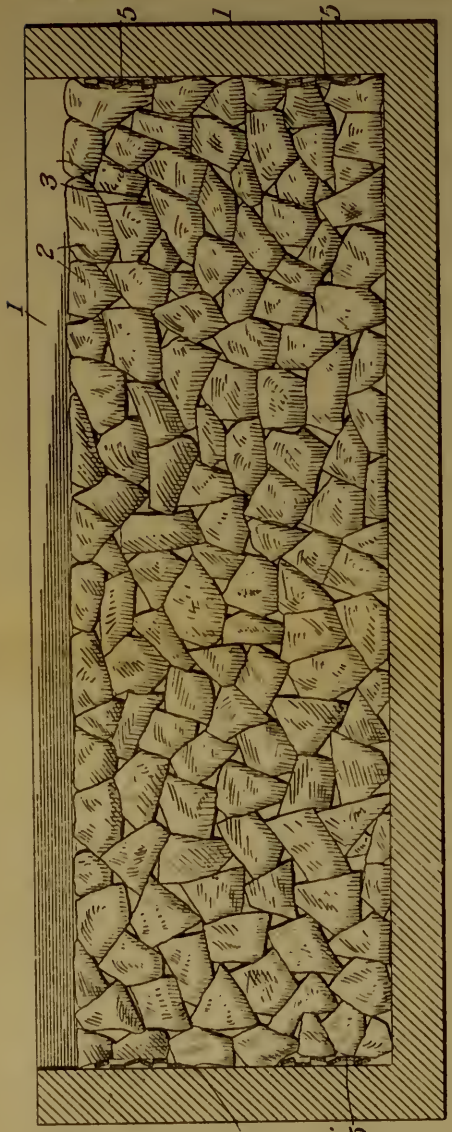


Fig. 3.

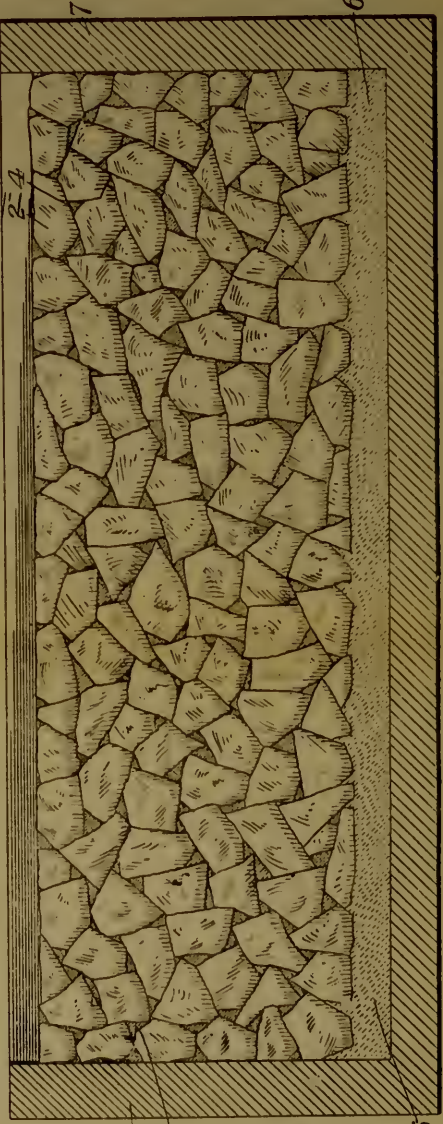


Fig. 4.

Witnesses:
C. G. Harbarger
H. L. Snyder

Inventor:
Frederick A. Malette.
by Wm. Stackbridge
Atty.

No. 751,089. PATENTED FEB. 2, 1904.

F. A. MALETTE.

METHOD OF MAKING CONCRETE BUILDING BLOCKS.

APPLICATION FILED APR. 17, 1903.

NO MODEL. 3 SHEETS—SHEET 3.

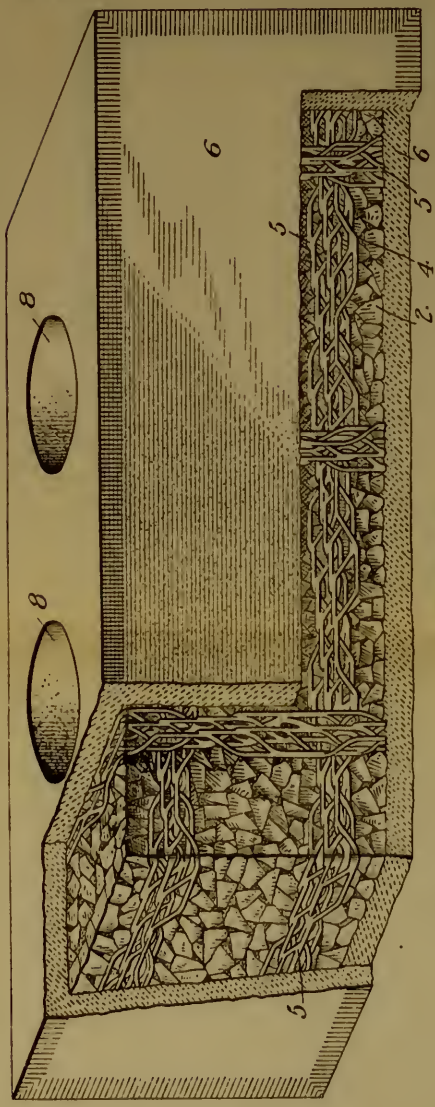


Fig. 5.

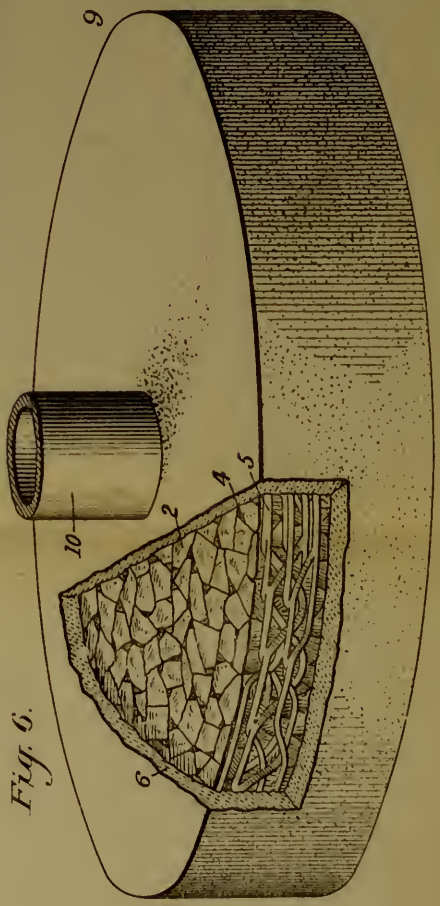


Fig. 6.

Witnesses:
C. F. Harbinger
A. L. Snyder

Inventor:
Frederick A. Malette
by Thos. Stockbridge
Atty.

No. 751,089. Patented February 2, 1904.

UNITED STATES PATENT OFFICE.

FREDERICK A. MALETTE, OF GENEVA, NEW YORK.

METHOD OF MAKING CONCRETE BUILDING-BLOCKS.

SPECIFICATION forming part of Letters Patent No. 751,089, dated February 2, 1904.

Application filed April 17, 1903. Serial No. 153,040. No model.)

To all whom it may concern:

Be it known that I, FREDERICK A. MALETTE, a citizen of the United States, residing at Geneva, New York, have invented a new and useful Method of Making Concrete Building-Blocks, of which the following is a specification.

My invention is designed for the production of an improved concrete building-block or the like having all the features of merit of the ordinary artificial building block or stone, with the advantage thereover of greater strength, rigidity, and strain-resisting power and the further advantage that it may be more easily and cheaply constructed.

The invention consists in the method of making the bulding-block.

In carrying out the invention crushed or broken stone is covered with a coating of mortar, preferably composed of sand and hydraulic cement or of sand, hydraulic cement, and stone dust or screenings. This coating is applied to the surfaces of all the individual stones. Afterward the crushed stone thus coated is placed in a mold, and by compression, either by pounding or otherwise, the stones are bonded together, the bonding being effected by the compression to which the stones are subjected independent of the action of the cement. By thus bonding the stones together the spaces or voids between them are not filled. After the bonding a suitable mortar of thin consistency—composed, for example, of hydraulic cement and sand or stone dust, or both—is poured upon the bonded mass of stone and allowed to flow down and fill a considerable portion of the spaces between the stones. The voids are thus filled after the bonding of the stone instead of at the same time, as is done according to the usual method of mixing concrete when the aggregate and mastic are combined in the same operation. The bonding of the large stones themselves in the first operation makes the completed work much stronger than when dependence is placed entirely upon the cement and mortar. This is due to the fact that the original or natural strength of the individual stones is utilized, that the same are enabled to lie in close contact with each other at their adjacent points, and that they are maintained in such condition by the pressure to which they are subjected. Where a large block is to be made, the filling of the voids with thin mortar must be effected during the operation of building up the block, for the reason that with a very thick or high block the thin mortar will not flow from the top to the bottom, so as to fill the voids or spaces between the stones. In making a large block I proceed in the same manner as above described, except that a larger mold is employed, which is first only partially filled with the broken stone coated with mortar. The mass of stone is subjected to compression, as before, by pounding or in any other suitable way, and the voids or spaces between the stones are afterward filled by pouring thereon a mortar of thin consistency, preferably composed of hydraulic cement and sand or stone dust or screenings. When this has been completed, more of the broken stone coated with mortar is placed in the same mold on top of the mass previously treated and subjected to compression, as before. Afterward the voids or spaces between the stones of the upper mass are filled in the same manner as above described. These steps are repeated until a block of the proper thickness has been completed. For securing additional strength or reinforcement, as in the case of a large block or pillar, expanded metal or its equivalent may be embedded in the block during the course of its construction. This is done by introducing the expanded metal into the mold before the mass of mortar-coated stones is placed therein and proceeding in the manner above described in the construction of the block. When the mortar with which the stones are originally coated and that with which the voids or spaces between the stones are filled has become set, the expanded metal will be interlocked and interwoven with the mass of stone along the outer surface thereof and will serve to impart greater stiffness and rigidity thereto. The use of the expanded metal in the construction of the building-block has the further advantage of providing projections to which a surface coating of mortar may secure itself when the same is applied in the completion of the block. The expanded metal may of course be applied in other ways

than as described. For example, it may be connected with the body of the block after the latter has been completed. Furthermore, wire-cloth or other suitable material may be employed as a substitute for the expanded metal.

When the building-block constructed according to my improved method is to be used in exposed places, a surface coating will be applied to those faces thereof which are outermost and are exposed to view. This surface coating is made of mortar composed, for example, of hydraulic cement and sand or stone dust or screenings, the same being applied while in a plastic condition to the surface or surfaces of the block which are to receive the same and carefully rubbed down and smoothed out, so as to give the same a finished appearance and to render the surface of the block waterproof. It is best to apply this coating to the surface or surfaces of the block by the application of pressure in order to cause the mortar of which the surface coating is made to penetrate the spaces between the stones of which the body of the block is made at the surface thereof. In the actual construction of the block it is intended to apply the surface coating to the body, which is composed of the broken stones bonded together, either before the voids between the stones at the surface of the block have been filled with the thin mortar which is intended to fill the same or before said thin mortar has become hardened or set. A tight gripping action between the surface coating and the body of the block may thus be obtained.

The block may be made hollow, if desired, the only thing necessary to effect this result being to introduce one or more wooden or other cores into the mold prior to the introduction and compression of the mortar-coated stones therein, building up the block around said core or cores and afterward removing the same.

In the construction of pillars it is my purpose to make the same in sections, which are preferably tapering in form and are circular, elliptical, or other suitable shape in cross-section. Each of said sections will preferably be formed with a circular or other suitable opening therein at its center, so that in building up a pillar from the different sections the latter may be strung upon a metal tube or upright which extends through the openings therein.

In order that my invention may be the more readily understood, I have illustrated my improved block in the accompanying drawings in various stages of its completion.

Figure 1 is a sectional view of one of the molds employed, showing a block in its first stage—that is, after the mortar-covered stones have been introduced into the mold and bonded together by compression, but before the voids or spaces between the stones have been filled. Fig. 2 is a similar view showing a block in its mold after the voids or spaces between the stones have been filled. Fig. 3 is similar view showing a block built up in its mold with the expanded-metal reinforce. Fig. 4 is a similar view showing one means of applying a surface coating to the body of the block by the application of pressure. Fig. 5 is a perspective view, partly broken away, of a completed block having openings formed therein and provided with an expanded-metal reinforce; and Fig. 6 is a similar view of one of the block-sections employed in the building up or construction of a pillar, showing a metallic upright extending through the opening at the center thereof.

Like reference-numerals indicate like parts in the different views.

The mold 1 may of course be of any suitable shape, the particular shape being determined by the form which it is intended the completed block shall assume. Into this mold, as shown in Fig. 1 of the drawings, is placed a mass of mortar-coated stones 2, which while in the mold are subjected to compression without filling the voids, the said voids being indicated in Fig. 1 of the drawings by the numeral 3. In the same mold after the bonding by compression the mass of stones has poured thereon a layer of motor of thin consistency, which flows down through the spaces between the stones and fills or partially fills said spaces, as indicated at 4 in Fig. 2 of the drawings. When the block is to be supplied with a reinforce 5 of expanded metal, wire-cloth, or the like, the latter is introducee into the mold, as shown in Fig. 3 of the drawings, and the mortar-covered stones 2 compressed and bonded within it. The metallic reinforce may, however, be otherwise applied to the body of the block, if desired.

One means of applying the surface coating 6 to the block is illustrated in Fig. 4 of the drawings. The mass of mortar which is intended to form the surface coating of the block is placed in the bottom of a mold 7 while in a plastic condition, and a block consisting of the bonded mass of crushed or broken stones is placed down upon the mass which is to form the coating and pressure applied from above. The mortar of the coating is thus caused to penetrate the spaces or voids between the stones at the surface and when it hardens adheres closely thereto by being locked in place. As heretofore stated, it is preferred to apply the the surface coating 6 before the voids between the crushed stones along the surface to be covered have been filled or before the mortar filling said voids has become hardened. If the surface coating is to be applied to more than one face of the block, the mortar which is to constitute the same is introduced either at the side or top of the mold or at both places.

The openings 8 in the block may be produced by introducing cores into the mold 1,

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building up the block around said cores, and afterward removing the same.

The block-section 9 (shown in Fig. 6 of the drawings) is one which is intended to be used in the construction of a pillar. The same is made in a similar manner to the other forms of blocks described, but has been shown as circular in cross-section and as tapering from its base upwardly. Each section 9 is formed with an opening extending vertically therethrough to enable the different sections which go to make up a complete pillar to be strung upon a metallic tube or upright 10.

While I have described my invention as a method of making building-blocks, it is intended, of course, to cover a method of making posts, pillars, or other building stone or foundation.

Having now described my invention, what I claim as new, and desire to secure by Letters Patent, is—

1. The method of making concrete building-blocks and the like, which consists in coating the individual stones with mortar, subjecting a mass of the stones thus coated to compression and simultaneously molding said mass into proper shape, whereby the stones are bonded together independent of the action of the mortar and without filling the spaces or voids between them, beneath the surface of the mass, and afterward pouring a thin mortar onto the mass and allowing it to flow down into the voids between the stones and partially fill the same.

2. The method of making concrete building-blocks and the like, which consists in coating the individual stones with mortar, subjecting a mass of the stones thus coated to compression and simultaneously molding said mass into proper shape, whereby the stones are bonded together independent of the action of the mortar and without filling the spaces or voids between them, beneath the surface of the mass, afterward pouring a thin mortar onto the mass and allowing it to flow down into the voids between the stones and partially fill the same and finally applying a surface coating to one or more faces of the block thus formed.

3. The method of making concrete building-blocks and the like, which consists in coating the individual stones with mortar, subjecting a mass of the stones thus coated to compression and simultaneously molding said mass into proper shape, whereby the stones are bonded together independent of the action of the mortar and without filling the spaces or voids between them, beneath the surface of the mass, afterward pouring a thin mortar onto the mass and allowing it to flow down into the voids between the stones and partially fill the same, and finally applying a surface coating of fine mortar to one or more faces of the block, before the spaces or voids between the stones at the surface have been filled.

4. The method of making concrete building-blocks and the like, which consists in coating the individual stones with mortar, subjecting a mass of the stones thus coated to compression and simultaneously molding said mass into proper shape, whereby the stones are bonded together independent of the action of the mortar and without filling the spaces or voids between them, beneath the surface of the mass, afterward pouring a thin mortar onto the mass and allowing it to flow down into the voids between the stones and partially fill the same, and finally applying, with pressure, a surface coating of fine mortar to one or more faces of the block, before the thin mortar introduced into the voids has set.

5. The method of making concrete building-blocks and the like, which consists in coating the individual stones with mortar, subjecting a mass of the stones thus coated to compression, and simultaneously molding said mass into proper shape, whereby the stones are bonded together independent of the action of the mortar and without filling the spaces or voids between the stones beneath the surface of the mass, pouring a thin mortar onto the mass and allowing it to flow down into the voids between the stones and partially fill the same, subjecting another mass of the stones thus coated to compression above the mass originally treated and simultaneously molding the latter mass into proper shape, pouring a thin mortar onto the latter mass and allowing it to flow down into the voids between the stones and partially fill the same, and continuing these steps until a block of the proper size is made.

6. The method of making concrete building-blocks and the like, which consists in coating the individual stones with mortar, subjecting a mass of the stones thus coated to compression, and simultaneously molding said mass into proper shape within a band of expanded metal or the like with which the mass of stones is surrounded, whereby said stones are bonded together independent of the action of the mortar and without filling the spaces or voids between them beneath the surface of the mass, and afterward pouring a thin mortar onto the mass and allowing it to flow down into the voids between the stones and partially fill the same.

In testimony whereof I have hereunto set my hand in presence of two subscribing witnesses.

FREDERICK A. MALETTE.

Witnesses:
J. G. FARWELL,
I. V. TRAINOR.

CERTIFICATE OF CLERK U. S. DISTRICT COURT TO TRANSCRIPT OF RECORD.

United States of America,
District of Oregon,—ss.

I, G. H. Marsh, Clerk of the District Court of the United States for the District of Oregon, do hereby certify that the foregoing pages numbered from 3 to 254, inclusive, constitute the transcript of record on appeal from the decree of said court in a case in which the Shope Brick Company, a corporation, is plaintiff and appellee, and Roy Ward and Otto Peterson, copartners doing business under the firm name of Ward and Peterson, copartners, are defendants and appellees; that said transcript has been compared by me in accordance with the praecipe for transcript filed by the said appellants and is a true and complete transcript of the record and proceedings, in accordance with said praecipe, had in said court in said cause as the same appear of record and on file at my office and in my custody.

I further certify that the cost of the foregoing transcript is $55.85, and that the same has been paid by the said appellant.

In testimony whereof, I have hereunto set my hand and caused the seal of said court to be affixed, at Portland, in said district, this 19th day of July, 1924.

[Seal] G. H. MARSH,
Clerk.

[Endorsed]: No. 4290. United States Circuit Court of Appeals for the Ninth Circuit. Roy Ward & Otto Peterson, Copartners Doing Business Under the Firm Name of Ward & Peterson, Copartners, Appellants, vs. Shope Brick Company, a Corporation, Appellee. Transcript of Record. Upon Appeal from the United States District Court for the District of Oregon.

Filed July 23, 1924.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

In the United States Circuit Court of Appeals for the Ninth Circuit.

Appeal—No. ——.

WARD & PETERSON,

Appellants,

vs.

SHOPE BRICK CO.,

Appellee.

STIPULATION RE PRINTING ORIGINAL EXHIBITS.

In the above-entitled cause it is hereby stipulated by and between counsel for the respective parties that the photographs which constitute Plaintiff's Exhibits Nos. 3, 4, 5, 6, 7, 8, 9, and 10, in the tran-

script from the Trial Court, need not be reproduced in making up the printed record, and the Clerk of the Court is hereby authorized and directed to omit reproductions of said exhibits from the printed record in the case.

Portland, Oregon, July 17th, 1924.

ATKINS & ATKINS,
Counsel for Appellants.
ROBERT R. RANKIN,
Counsel for Appellee,

[Endorsed]: No. 4290. In the United States Circuit Court of Appeals, for the Ninth Circuit. Ward & Peterson, Appellants, vs. Shope Brick Company, Appellee. Stipulation Under Rule 23. Filed Jul. 23, 1924. F. D. Monckton, Clerk. By Paul P. O'Brien, Deputy Clerk.

In the District Court of the United States for the District of Oregon.

July 15, 1924.

No. E–8661.

SHOPE BRICK COMPANY,

vs.

ROY WARD et al.

ORDER EXTENDING TIME TO AND INCLUDING JULY 31, 1924, TO FILE RECORD AND DOCKET CAUSE.

Now, at this day, for good cause shown, it is ORDERED that the time for filing the transcript

of record in this cause and docketing the same in the United States Circuit Court of Appeals for the Ninth Circuit be, and the same is hereby, extended to and including July 31, 1924.

R. S. BEAN,
Judge.

[Endorsed]: No. 4290. United States Circuit Court of Appeals for the Ninth Circuit. Order Under Subdivision 1 of Rule 16 Enlarging Time to and Including July 31, 1924, to File Record and Docket Cause. Filed Jul. 23, 1924. F. D. Monckton, Clerk. By Paul P. O'Brien, Deputy Clerk.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

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WARD & PETERSON,
Appellants,

vs.

SHOPE BRICK CO., a Corporation,
Appellee.

Appeal No. 4290

APPELLANTS' BRIEF

Upon Appeal from the United States District Court for the District of Oregon.

ATKINS & ATKINS,
JOSEPH L. ATKINS,
LEICESTER B. ATKINS,
Attorneys for Appellants.

F. W. BALTES AND COMPANY, PRINTERS, PORTLAND

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IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

WARD & PETERSON,
Appellants,

v.

SHOPE BRICK CO., a Corporation,
Appellee.

Appeal No. 4290

STATEMENT OF THE CASE

This is an equity suit brought by plaintiff-appellee, a corporation, hereinafter designated plaintiff, against defendants-appellants, hereinafter designated defendants, to-wit, Roy Ward and Otto Peterson, co-partners doing business in Portland, Oregon, under the firm name and style of Ward & Peterson. The bill is in usual form and seeks to obtain redress for alleged infringement of rights alleged to be secured to plaintiff of United States letters patent No. 985,709, issued under date of February 28, 1911, for "METHOD OF WATERPROOFING CEMENT BLOCKS."

Plaintiff deduces title by mense assignments from David F. Shope, to whom, as applicant therefor, the said patent was issued.

In its bill as originally filed, plaintiff included in this suit two other patents, namely, 1,270,450, and 1,306,977, issued, respectively, June 25, 1918, and June 17, 1919; but at the trial it restricted its suit to aforesaid Patent No. 985,709. For that reason,

the decision rendered below relates only to the patent last named, and this appeal is limited to the consideration, solely, of that patent.

DEFENSES

Defendants plead:

(I) Invalidity of the patent sued on, because of anticipation in the prior art;

(II) Invalidity, because what the patent discloses does not involve invention in view of what is shown in the state of the prior art;

(III) Invalidity, because the invention which the said patent purports to cover is wholly inoperative for any new and useful purpose whatsoever;

(IV) Non-Infringement.

For convenient brevity the patent in suit is hereinafter designated "the Shope patent," and the alleged invention which it describes, as "Shope's invention," or briefly "Shope".

Italics, bold faced, or other distinctive type employed herein are ours unless otherwise indicated.

DEFENDANT'S THEORY OF THE CASE

Before examining in detail the evidence, and the cases and authorities, and before entering upon the general argument of the case it is deemed advisable to give a brief outline of defendant's theory of the case.

While the patent sued on was granted for an alleged new and useful Method of Waterproofing

Cement Blocks, it is clear from the File Wrapper and Contents alone that the patentee never represented to the Patent Office that he claimed to have invented anything new in Cement Blocks; but that he proposed only to patent a method, namely: the adding to such a block "formed in the usual manner" (Shope Spec., p. 1, line 56) a waterproof face by the application of cement, either neat or mixed with sand or other ingredients (Ib. lines 62-63).

The patentee does not and cannot claim to have been the first to apply such a face to a block. If he may be considered to have done so in the form in which he first presented his application, it was a mistake upon his part, which upon rejection by the Patent Office, he, without controversy, admitted and corrected.

What the Patent Office finally allowed was two claims, each limited to a specific mode of imparting a so-called waterproof face to a cement block, by applying water and cement to the face of the block, so as to cause the water to "enter the pores or voids of the block to the required depth, and carry with it the cement powder sifted thereon" (Ib. lines 66-69).

Claim 1 of the patent is limited substantially to the terms last above quoted. Claim 2 contains the same limitations as claim 1, but is differentiated therefrom by including *agitation* as a final step to complete the method defined in the claim.

There is no evidence that plaintiff or any one else ever attempted to practice the method defined in

claim 1. There is no evidence that the alleged invention as defined in either of the claims ever resulted in causing the cement of the face coating applied to the block to enter the pores or interstices of the block. The evidence is all the other way, and contradicts the very principle of operation alleged as a condition precedent to the granting of the patent.

All that the plaintiff does in its manufacture of brick is to bring water and cement together upon the face of the block while it is confined in its mold, and mix them by the violent agitation of them by aid of a surface-rubbing instrument, technically known as a "float," which is a kind of trowel. Mr. Werner, plaintiff's expert witness, correctly describes (Record, p. 194) the step of the method indicated in this paragraph as a mixing *"in situ."*

Mixing *in situ* instead of the usual mixing *ex situ* —that is to say, as defendants do it, on a mortar board—is the only pretense of a distinctive feature of the Shope "invention" observed in practice by the plaintiff. Nevertheless, the plaintiff has sued the defendants for exercising an "art" that is hoary with age, the said "art" being neither more nor less than spreading a coat of mortar on a brick. It is almost beyond the power of belief, but it is nevertheless true, that the court below has, in effect though of course inadvertently, sustained the plaintiff in its extravagant position.

Our contention is not only that Shope obtained a patent limited to a certain definite narrow scope,

but also that even to obtain it within that scope he made representations of fact which are untrue, as pointed out under head IV hereof, and none the less so because he may have believed them to be true. Now, having so obtained the patent, he seeks through this court, in defiance of the prior state of the art, to have the patent expanded beyond its plain limitations, into an odious monopoly, an instrument of oppression.

If we may do so without appearing to assume to instruct this honorable court in the discharge of its duty, we would in this connection invite attention to a recent decision in the case of E. A. McMillin Co. v. Androscoggin Pulp Co., 291 Fed. 134. In that case, on page 137, Judge Hale for the Southern District Court of Maine, says: "It is the duty of courts sitting in patent cases to recognize invention when they meet it; but it is also clear that it is their duty not to extend such recognition to mere mechanical skill."

In an earlier case, Judge Brown, speaking for the District Court of Rhode Island, says:

> "The present hearing illustrates even more fully than the former hearing the necessity of requiring a patentee to reasonably limit his claims, so that they shall embody and specify elements essential to his actual improvement in the art. The right of a patentee to exclude others from the use of old and familiar mechanical combinations and structures must be carefully restricted. The duty

rests upon the court to guard the public against that form of unjust monopoly, which may result from sustaining highly abstracted claims. The language of the Supreme Court in Carlton v. Bokee, 17 Wall. 463, 471, 21 L. Ed. 517, should always be in mind.

"'We think it proper to reiterate our disapprobation of these ingenious attempts to expand a simple invention of a distinct device into an all-embracing claim, calculated by its wide generalization and ambiguous language to discourage further inventions in the same department of industry.'

"An attempt to save such claims by a beneficent interpretation is not only contrary to well-established patent law, but a practical mistake. Patent claims are advisedly made by skilled solicitors, and if they choose to claim abstractions or high generalizations they must stand by them.

"As was said in American Bell Tel. Co. v. National Tel. Mfg. Co., (C. C.) 109 Fed. 1043:

"'The patent statutes requires the patentee himself to claim and define his invention so that the public may know its right, and so that there shall not be imposed upon the courts the burden of constructing upon a hearing new claims from the interpretations that experts may place upon language of the most sweeping and general character.'"

Robinson v. Tubular Woven Fabric Co., 248 Fed. 526-546, at pages 541-542. Affirmed and opinion endorsed 254 Fed. 304 (306).

In the instant suit, we should not regard the claims as "high generalizations," except for the fact that they appear in some way, for which we cannot on any other theory account, to have misled the court below.

DECISION OF THE TRIAL COURT

The opinion of the court below was delivered orally. It appears in the Record, with approval by Judge Bean, as it was reported and transcribed by the court stenographer, in the following words:

"IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF OREGON

Shope Brick Company,
Complainant,

v.

Roy Ward and Otto Peterson,
Defendants.

Portland, Oregon, June 9, 1924.

R. S. Bean, District Judge: (Oral)

This is a suit for infringement of patent issued to plaintiff's assignee in February, 1911. The patent covers a process for waterproofing cement brick or cement blocks, and consists of the covering of the face of the block with water then applying pure cement and by agitating forcing the solu-

tion or mixture into the pores of the block, thus making it waterproof.

There are two questions raised by the defendant: First, that they have not infringed this patent, and second, that the plaintiff was not the original inventor of the patent process. Now, as far as the first question is concerned, there is in my judgment no room for controversy about the infringement. The process used by the defendant was substantially the same as that covered by the patent, so if the patent is valid there is in my judgment no question about the infringement.

Now the patent is the first one issued covering this method or this process. There were prior patents issued for covering cement blocks with cement, but it was either under pressure or by simple dipping, but the process described in plaintiff's patent is not anywhere disclosed directly by the prior art, and the rule is that the granting of a patent is prima facie evidence that the patentee is the first inventor, and of its novelty, and the burden of proof is on one who assails the patent for want of novelty, and many authorities have stated that every reasonable doubt should be resolved against him. Now, in view of that rule, as I interpret this record, it has not been shown clearly that the patentee was not the original and first inventor of this process, and for that reason it seems to me that the plaintiff is entitled to the relief demanded in his prayer."

The foregoing decision is based entirely upon what the Patent Office simply accepted as an *ex parte* definition of an alleged invention which we contend does not exist in fact. The operativeness of the alleged invention, although positively denied, was not attempted at the trial to be proved. Reasons for denial of operativeness are hereinafter, under Head IV, set forth with particularity of detail.

The court below, disregarding the rule that "in construing a patent it is necessary to consider the state of the art when the application for it was made" (Burt v. Evory, 133 U. S. 349, 33 L. Ed. 647), adopts what we understand to be plaintiff's theory of the case, namely: that the invention described and claimed in the patent sued on is one of broad generic scope; that it is not anticipated in the prior art; and that the patent is entitled to every consideration which the law confers upon a basic patent issued to a pioneer inventor.

This theory we maintain to be altogether false, because it is based on a misconception of the true nature of the invention, and a misinterpretation of the patent intended to be conveyed in the grant.

POINTS AND AUTHORITIES

I.

PATENT SUED ON IS INVALID

The trial court appears to have fallen into error in consequence of having disregarded not only the rule of construction in Burt v. Evory, *supra,* but

also the plain limitations imposed by the Patent Office upon the patent, and of conceding to it a scope far beyond any claim embraced in it, a scope indeed so broad as to include matter which was actually relinquished and in effect disclaimed by the patentee in order to obtain his patent. This proposition is amply supported by the showing made in the File Wrapper and Contents (Record, pp. 230-3-7-8-9).

What defendants did, if it was old to do it, as we allege it was, goes to prove the invalidity of the patent sued on. This conclusion follows of course from the doctrine repeatedly recognized by this honorable court, and stated by the Supreme Court to be well established, towit:

> "That which infringes a patent if later, would anticipate it if earlier."

See Knapp v. Morss, 150 U. S. 221; 37 L. Ed. 1059, and authorities there cited.

On final analysis, it appears that the court below has been led into the palpable error of holding: PLAINTIFF HAS THE EXCLUSIVE RIGHT TO PLASTER A BRICK WITH CEMENT.

The last statement is a bold one; but it is submitted to be amply supported in the digest of the File Wrapper next below appended.

PATENT IN SUIT—FILE WRAPPER DIGEST

The File Wrapper shows that the application for the patent in suit was filed on October 9th, 1909, with three claims reading as follows:

"1. The herein described method of waterproofing the faces of cement blocks which consist(s) in first mixing cement and sand in a semi-dry condition and molding it into blocks, then applying water upon the face of the block and spreading dry cement thereon.

"2. The herein described method of waterproofing the faces of cement blocks which consists in first forming the block by mixing sand and cement in a semi-dry state and molding it, then pouring water upon the face of the block until it is covered, then spreading cement upon the water and agitating the mixture to carry the cement into the interstices of the block of the required depth.

"3. The herein described method of waterproofing the faces of cement blocks which consists in first molding cement and sand in a semi-dry state, then covering the face of the block with water, then spreading cement upon the water and agitating the mixture, and then stippling the face of the block."

Under date of January 4, 1910, the Patent Office, in its first action, rejected all the claims, citing against claims 1 and 2 two U. S. patents, towit:

Jacques, 748,611, dated Jany. 5, 1904.
Haddock, 531,842, dated Jany. 1, 1895.

In rejecting claim 3, two patents were cited, towit:

Lake, 743,525, dated Nov. 10, 1903.
Henderson, 886,124, dated April 28, 1908.

By amendment, Paper No. 3, dated April 11, 1910, in response to rejection aforesaid, the claims were reduced in number to two, by cancellation of claims 1 and 3, above quoted, and the introduction of a new claim 1, as follows:

"1. The herein described method of forming a water-proof faced cement block which consists in *first* mixing cement and sand in a semi-dry state and molding it into a block, *next* covering the face of the block with water *and then* sifting dry cement thereon, *whereby the water will carry the added cement into the pores of the block without the application of external pressure.*"

Claim 2 was amended, lines 1 and 2, by substituting for the words "waterproofing the faces of cement blocks," the words "forming a waterproof faced cement block." Correction, line 4, of claim 2, was also made of a mere typographical error.

A second rejection, Paper No. 4, dated April 19, 1910, promptly followed. In reference to claim 1, last quoted rejection reads as follows:

"Claim 1 covers nothing beyond the ordinary process of laying cement sidewalks when the surface of the pavement is coated in whole or in part with water brought to the surface by tamping. It is accordingly rejected upon Haddock."

In a final amendment, Paper No. 5, dated June 14, 1910, the grounds of rejection advanced in office letter, Paper No. 4, last aforesaid, were acquiesced in, and amendment was made as follows, towit:

Substitution, for claim 1 last above quoted, of claim 1 of the patent.

Claim 2 was also by slight amendment made to read in the words of claim 2 of the patent.

Allowance of the application followed under date of August 6, 1910. Payment of the final government fee was delayed substantially to the end of the period allowed by law for its payment, and the patent was issued February 28, 1911.

A critical examination of the patent in suit in view of the foregoing history which its File Wrapper affords, and of the Haddock patent, No. 531,842 (Defendants' Exhibit H, Record, pp. 262-264), cited therein, will lead to a correct understanding of the true scope of the patent as well as of its plain limitations. It has been, in view of the repeated amendments made by the applicant Shope in response to the several actions of the Patent Office, deemed by counsel for both parties unnecessary to burden the Record with copies of patents which were cited in the first rejection made by the Patent Office, other than that of Haddock aforesaid.

SPECIFICATION OF PATENT SUED ON

The patent in suit, page 1, lines 9 to 28, inclusive, presents, in conformity to Rule 39(b) of the Patent Office, the following "General Statement":

> "My invention relates to the method of forming cement blocks having a waterproof facing, its object being to waterproof the exposed face of the block without the application of external pressure or the use of special waterproofing compounds, and in such manner that the block can be immediately removed from the mold.
>
> "Cement blocks, as distinguished from cast stone, are usually formed by pressing or tamping in a mold a mixture of sand and cement in a damp or semi-dry state so that the blocks can be immediately removed from the mold. The block, when formed and cured, is a porous body with interstices, voids, or pores between the particles of sand and cement, to which mortar will adhere in wall construction, but which must be waterproofed on its exposed face to prevent the absorption of moisture."

"Detailed description," required Section (d) of Rule 39, aforesaid, beginning same page, line 55, reads:

> "In the present method the block is first formed *in the usual manner* by mixing sand and cement in a slightly moist or semi-dry state, and pressing or tamping it in a mold. Water is next applied,

as by sprinkling, to the face of the block in sufficient quantity to enter the pores or interstices of the block, and then a *powder of cement,* either neat or mixed with sand or other ingredients, is sifted upon the water, which is at the same time agitated so as thoroughly to saturate the face of the block. *The water will* thus enter the pores or voids of the block to the required depth, and *carry with it the cement powder sifted thereon.* The water serves both to carry the cement into the pores and to cause crystallization of the added cement, and no external pressure will be required to force the water and cement into the block. The face of the block is then stippled or otherwise treated as may be desired, and the block removed from the machine and cured in the usual manner."

Immediately following the matter last quoted, in lines 78 to 88, inclusive, appears the following paragraph:

"It will be understood that the main portion of the block remains in a comparatively dry state so that it can be immediately removed from the mold, and all its faces, except those exposed to the water and crystallizing mixture, will be porous so that the mortar will adhere to them, while the outer face will be proof against the absorption of water because all of the interstices and pores have been filled with crystallized cement."

The aforesaid "detailed description" of the patent, same page, lines 89 to 92, inclusive, concludes with a definition of the intended scope of the term "block" employed in both claims, which reads as follows:

> "The word 'block' is here used generically to include a brick, tile, or other mass of any shape or size, as well as a 'block' technically so called."

Compare testimony of plaintiff's expert, Werner, Record, page 190, particularly lines 15-17.

CLAIM OF PATENT SUED ON

Section 4888 of the Revised Statutes, makes the claims of a patent an indispensible part of every application for patent.

The court is doubtless familiar with the law on this subject, but it is deemed not inept to present the following propositions of law:

All claims are required to be definite "so that the public may know what they are prohibited from doing during the existence of the patent, and what they are to have at the end of the term as a consideration for the grant."

> Brooks v. Fiske, 15 How. 212, at 215; 14 L. Ed. 665.

> "It seems to us that nothing can be more just and fair, both to the patentee and to the public, than that the former should understand and correctly describe just what he has invented, and for what he claims a patent."

Merrill v. Yeomans, 94 U. S. 568, at 573; 24 L. Ed. 237.

The invention patented is the invention set forth in the claims and that only.

O'Reilly v. Morse, 15 How. 62; 14 L. Ed. 601.
Yale Lock Mfg. Co. v. Greenleaf, 117 U. S. 554, 555; 29 L. Ed. 952.
McClain v. Ortmayer, 141 U. S. 419, 424; 35 L. Ed. 800.
Grant v. Walter, 148 U. S. 554; 37 L. Ed. 557.

CLAIMS CANNOT BE ENLARGED BY SPECIFICATION

"(1) Strictly speaking, infringement of a patent is an erroneous phrase; what is infringed is a claim, which is the definition of invention, and it is the claim which is the cause of action.

"One may appropriate many of the ideas or concepts suggested by specification and drawing, but it is the claim that measures both the patented invention and the infringement thereof. This rule obtains whether the patent be properly spoken of as great or small, primary or secondary."

(Citing Walker on Patents, 5th Ed., 186.)

"(2) A patentee may describe something that he does not claim, or claim that which he has not described; *his grant of privilege is construed to cover only that which is BOTH described and*

claimed, no matter how broad the claim-language may be. . . . Description may limit a claim, *which must always be read in the light of the prior art;* but it can never expand it. So that a patent (i.e., a claim) can never be given a construction broader than its terms in order to cover something which might have been claimed but was not.

"(3) The drawings may help out an ambiguous description, but never can they supply the entire absence of any written description of a feature of the invention."

Fulton Co. v. Powers Regulator Co., 263 Fed. 578, page 580.

The rule observed by the Supreme Court in Westinghouse v. Boyden Power Brake Co., 170 U. S. 537, at page 558; 18 Supt. Ct. 707; 42 L. Ed. 1136, that the mere terminology of a claim does not determine infringement, when the *parts* indicated thereby are *functionally different,* implies that in order to properly construe a claim it is necessary to consider the precise nature of the invention it purports to define. Otherwise, it were impossible to make that comparison of two objects of apprehension which is necessary to the forming a judgment of whether they agree or disagree.

It clearly appears, in the light of the rule just referred to, from what is set forth under the present heading, that the only claim made by the patentee Shope and allowed by the Patent Office is a

combination art (Robinson on Patents, Sec. 168), towit: one which includes, as the distinctive step of the process, *the causing of cement applied to* the face of *a porous block* made of moistened cement and sand, *to enter the pores of the block.* The rejection of claims which did not recite that function, and their consequent erasure are, we submit, conclusive on that point.

> Masseth v. Larkin, 111 Fed. 409, at page 411.
> See also, Heitler v. Brooklyn Shield & Rubber Co., citation next below, first sentence there quoted.

The means for accomplishing the end last named is, in claim 1, defined to be: "applying water to the face of the block in a sufficient quantity to enter the pores or interstices of the block, and adding cement to the water, whereby the cement will enter the pores or interstices with the water." The language just quoted is the only differentiation offered to distinguish the subject matter of claim 1 from the prior art, and from claims rejected on it and thereupon cancelled.

In the case of Masseth v. Larkin, just above cited, Judge Buffington, for the Circuit Court of the Western District of Pennsylvania, uses the following apt language:

> "To ignore the express functional limitation of the claim, viz., 'arms adapted to engage with the sides of the hole,' would be to create a new claim,

not interpret the one granted. Anthony Co. v. Gennert, (C. C. A.) 108 Fed. 396."

The case cited by Judge Buffington is precisely to the same effect, and is one in which he sat in the Circuit Court of Appeals for the Third Circuit.

Claim 2 is differentiated from claim 1, substantially by the addition thereto of the following words, towit: "agitating the mixture to carry the cement into the interstices of the block to the required depth."

The argument presented before the Patent Office in order to secure allowance of the claims of the Shope patent supports our position set forth in the three preceding paragraphs.

In that connection, Judge Campbell of the District Court for the Eastern District of New York, in Heitler v. Brooklyn Shield and Rubber Co., 295 Fed. 333, decides a case whose facts substantially correspond with those of the case at bar. Because of its pertinency, in several aspects, to this case, we quote below Judge Campbell's opinion at some length, beginning at page 336. The language employed by the court reads as follows:

"Of course, such argument cannot control or restrict the plain language of the claim finally allowed (A. G. Spaulding & Bros. v. John Wanamaker, 256 Fed. 530, 167 C. C. A. 602), but the applicant cannot now claim anything which was rejected. Van Epps v. United States Box Board

& Paper Co., (C. C.) 137 Fed. 418. Therefore, if the patent bears on its face a particular construction, the argument made before the Patent Office may confirm that construction. Goodyear Dental Vulcanite Co. v. Davis, 102 U. S. 227; 26 L. Ed. 149.

"In the face of the art cited by the Examiner, Bartlet, No. 1,144,631, and the French patent, No. 405,344, the argument on behalf of the applicant had weight, because both of those patents show garment protectors of substantially the same type, having elongated openings extending vertically from top to bottom over the thighs of the wearer, with transverse elastic bands or tapes bridging the openings, to hold the spaced apart front and rear parts of the garment yieldingly in position, and by the limitation as to the integral body surrounding the cut-out portion of the garment the applicant did clearly differentiate claim 2 of the patent in suit from the art so cited.

"If the Patent Office had cited all the pertinent patents, the presumption of validity would be sufficient to sustain the patent; but in the instant suit that presumption is greatly weakened, if not entirely rebutted, because of the failure of the Patent Office to cite patent No. 36,125, issued to Elizabeth Higgins, dated August 5, 1862. International Co. v. Young, (C. C. A.) 284 Fed. 831."

Reverting to the case at bar, the application to a porous block of a previous mixture of cement and

water is clearly anticipated in the prior art. It is shown in the Federici patent, Defendants' Exhibit G; in the Davies patent, Defendants' Exhibit L; in the Malette patent, Defendants' Exhibit W; and in the Thomas patent, Defendants' Exhibit V.

For the convenience of the court, copies of all the patents of the printed Record are incorporated in this brief, in numerical order.

FEDERICI PATENT—DEFENDANTS' EXHIBIT G

In the Federici patent, aforesaid, the block D thereof is shown and described as made of "comparatively coarse material"—sand and cement—with a layer C of pure cement in a plastic state. The fact that Federici provides an ornamental finish for his block by partially embedding pebbles B in the layer C "while the material is yet plastic" is wholly immaterial to the present inquiry. It simply means that Federici in 1894 regarded as unpatentable what plaintiff is now attempting to claim. Be that as it may, he did not claim it, and the rule of law is clear that what a patenteee might have claimed, but did not claim, he has dedicated to the public.

Keystone Bridge Co. v. Phoenix Iron Co., 95 U. S. 274, at 278; 24 L. Ed. 344.

Continental Paper Bag Co. v. Eastern P. B. Co., 210 U. S. 405; 52 L. Ed. 1122.

DAVIES PATENT—DEFENDANTS' EXHIBIT L

The Davies patent describes and claims the process of forming a post made, with express disclaimer of restriction as to shape, of a mass of *damp* sand or other coarse aggregates and cement, pounded into a mold, and afterwards, upon removal of the post from the mold when it "has become sufficiently set to permit of the post being handled without danger of breaking and before it has become finally set" (Davies Spec., page 1, lines 75-78) dipping it "into a bath of pure liquid Portland cement of such fluidity as that it will run smoothly and evenly over the entire exposed surfaces of the post and fill all cracks, crevices and interstices" (Ib. lines 80-84). Davies (Ib. page 2, lines 4-7) bases his claim solely upon distinction of his invention from *the then existing prior art of brushing or otherwise smearing a surface coating on a cement post.* The Davies patent issued July 1, 1902, and shows beyond question that at that date, which anticipated the Shope application by more than seven years, it was a matter of common knowledge that the protecting of cement blocks—fence posts—*"against the entrance of moisture"* (Ib. page 1, lines 40-41) could be accomplished by the application to the surface thereof of a fluid mixture of Portland cement and water. Davies only claimed at that time the substitution of dipping the post in a bath of liquid cement *instead of the admittedly old method of brushing or otherwise smearing the liquid upon the surface*

treated. The Davies patent of itself alone reduces the scope of the Shope patent to the exceedingly narrow and well defined limits attributed to it.

The fact that the Davies patent refers specifically to a concrete fence post is of no possible consequence, particularly in view of the definition (*supra,* page 16) of the term "block" contained in the Shope patent.

THOMAS PATENT—DEFENDANTS' EXHIBIT V

Besides the showing made in the Federici and Davies patents last above referred to, the Thomas patent, Defendants' Exhibit V, presents a complete anticipation of the alleged invention of the Shope patent. The Thomas patent issued May 17, 1910, but it was filed in the Patent Office two years ahead of Shope, on October 12, 1907. Moreover, Shope testifies (Record, page 78, lines 4, 5) that he cannot fix an exact date, but did not make his alleged invention until some time in 1908.

A special importance attaches to *the Thomas patent,* because it *was not cited by the Patent Office against Shope.* One of two conclusions must be drawn from that circumstance. One conclusion is that the Shope claims were already regarded by the examiner as restricted only to the narrow scope we admit to be ascribable to them by the utmost stretch of construction, and that there was therefore no occasion to cite Thomas. The other conclusion is that the examiner overlooked the Thomas patent.

We are of opinion that the examiner did not overlook Thomas, but if he did, his doing so, considering its extreme pertinency, impairs the presumption of validity raised by the grant of the Shope patent to the point of actually destroying such presumption. We, therefore, trust that it will not overtax the patience of the court if we submit a few authorities on this point.

PRESUMPTION OF VALIDITY

"The Patent Office being charged by law with the duty and being given the power to pass upon all applications for patents, the courts always prima facie presume that its action in granting a patent is correct. But this presumption has not been treated by the courts as conclusive, and the reports are full of cases in which the *presumption* was *overcome and the patents held invalid.* It is by no means certain that this has not been the result *in a majority of cases which have reached the Supreme Court.* The reason must be that in many essential respects the hearing in the Patent Office is to a degree ex parte, and there must be a natural and altogether proper disposition *there* to give the applicant the benefit of all serious doubts."

Wm. B. Scaife & Sons Co. v. Falls City Woolen Mills, 194 Fed. 139, 145.

If the presumption raised by the issue of the Shope patent should come to be seriously consid-

ered, the language of the court, 3 C. C. A. next quoted, should, we submit, have weight with this court in reaching a decision. The court says:

> "We do not agree with the contention that the file wrapper discloses the patent to have been granted as first applied for, without any references, adds any force to the presumption of novelty arising from the grant. On the contrary, we think the force of that presumption is much diminished, if not destroyed, by the lack of any reference by the examiner to, or consideration of, the 'Clark' patents. It does not seem likely that an expert examiner would pass them by, without notice or consideration, if they had been called to his attention. We feed compelled, therefore, to the conclusion that the first and fifth claims of the patent in suit are invalid for want of patentable novelty."

American Soda Fountain Co. v. Sample, 130 Fed. 145, 149.

Heitler v. Brooklyn Shield & Rubber Co., (*supra*), even more clearly presents the point involved.

The Court of Appeals for the Sixth Circuit follows the decision last quoted, saying:

> "It should be noted that it appears from the record that neither Wightman nor the Potter patent was cited to the examiner in the Patent Office and were overlooked by him. This circum-

stance affects the presumption in favor of the validity of the patent from its issuance."

Westinghouse Elec. & Mfg. Co. v. Toledo P. C. & L. Ry. Co., 172 Fed. 371, 392.

"Nor is the ordinary presumption to be indulged in favor of the patent, because of the action of the Patent Office in allowing it; the Urie, Schwarz and Suter patents, as it appears, not having been referred to, as they have been here."

Elliott & Co. v. Youngstown Car Mfg. Co., 181 Fed. 345, 349.

"In this case some of the most significant patents in the Patent Office apparently were not cited or referred to in the consideration of the petition for the patent in suit. This circumstance alone goes far to overcome the presumption of validity."

Wm. B. Scaife & Sons Co. v. Falls City Woolen Mills, 194 Fed. 139, 145.

"The presumption referred to is sometimes defined to mean that the patent itself is prima facie evidence of novelty and of invention, but that presumption is probably a mere rule of evidence, which casts the burden of proof upon the alleged infringer. *This presumption cannot usurp the province of the court to declare what constitutes novelty.* The courts should give due considera-

tion to the action of the Patent Office, but should not permit that action to control its deliberate judgment when it is manifest that there is no invention."

J. J. Warren Co. v. Rosenblatt, 80 Fed. 540, 543.

"The Patent Office, however, has generally issued a patent to anyone who produced a device not before known, unless it was considered reasonably clear that such device did not involve invention. Therefore, in finding a remedy for the evils above stated, *the courts have held invalid a large percentage of litigated patents.*"

Boss Mfg. Co. v. Thomas, 182 Fed. 811, 816.

ANALYSIS OF THOMAS PATENT— DEFENDANTS' EXHIBIT V

In order to arrive at a correct appreciation of the scope of the disclosures made by the Thomas patent, as its importance demands, it is deemed proper to examine that patent with some particularity. Thomas, in his "General Statement," specifies (lines 11-14) that his invention "particularly contemplates the provision of a process whereby the *block* (artificial stone) *may be molded and handled at once,*" as compared with wet mold blocks which require time to set before they can be handled. "According to my invention," he again states, beginning at line 29, "I aim to provide a building block comprising a

body A composed of coarse aggregates and a comparatively small percentage of moisture, being thus made in low plasticity *which gives the opportunity of handling the product immediately.*"

The last sentence is important mainly by way of complete identification of the process of the Thomas patent with that of Shope, because Shope squarely concedes: "In the present method the block is first formed *in the usual manner* by mixing sand and cement in a slightly moist or semi-dry state, and pressing it or tamping it in a mold." (Shope patent, page 1, line 55 *et seq.*)

There can, therefore, be no question that Shope knew that the method of making a cement block just described was old in the art prior to his alleged invention; but, moreover, the Davies patent aforesaid shows that said method was old, as we have already indicated. It is unnecessary to multiply instances available to the same effect.

Pursuing our analysis, Thomas specifies (lines 26-28):

> "Figure 2 is a similar view (compared with Figure 1) of a modified form of building block constructed in accordance with my process."

In said Figure 2, a layer B is shown as an external coat spread upon the body A. With reference thereto, Thomas (Spec. lines 35-54) in his detailed description states:

"The face B of this block comprises a mixture of finely divided aggregates formed in a state of high plasticity, that is with moisture sufficient to render the same into a thoroughly plastic mass. Making the body A of the block of low plasticity and the face B of a high plasticity, *gives an opportunity of working the material* and at the same time *bringing out the virtues of the cement* and making the block of sufficient moisture in the mixture, *to produce perfect crystallization* and to produce stone instead of merely cemented sand and gravel. *This block is floated with some pressure which closes the pores in the cement to further the* OPPORTUNITY *of working the material properly* and the surface is preferably sifted over with finely crushed marble or stone C properly mixed with Portland cement to produce a beautifying crystallized effect."

Thomas concludes his specification with a final paragraph as follows:

"When a mixture is made very dry as heretofore in molding blocks, it is hard to get sufficient water to produce perfect crystallization, *while the facing of high plasticity provided by my process uses all the water that is necessary for perfect crystallization.*"

Incidentally, Thomas suggests, but preferentially only for ornamental purposes, the employment of an added surface coating C, as appears in above quota-

tion last but one. If it be objected that Thomas describes his face B as comprising a mixture with cement of finely divided aggregates (Spec. line 36) let it be noted in that regard that Shope likewise specifies the same mixture when he states (Patent, lines 62-64) that the outside waterproof face of his block is made as follows: "a powder of cement *either neat or mixed with sand or other ingredients* is sifted upon the water" that is previously applied to the block. Thomas does not specify the application of water to the body A of his block previously to the addition to it of the mixture which makes his layer B, but, as he states at the end of the last paragraph of his specification above quoted, relies upon the layer B to supply "all the water that is necessary for perfect crystallization."

Mr. Werner, plaintiff's expert witness, referring to Thomas (Record, page 184, lines 23-24), says:

> **"Here is a man who clearly had the same intent Shope had."**

Defendants deny (see Head II hereof) that there is any difference in respect to the order of the application of water and cement between that step of the method described in the Thomas and the Shope patents, respectively. Shope himself testifies (Record, page 84) that there is no difference. The method which consists in applying to a porous cement block a cement coating for waterproofing purposes is not only shown to have been old in the

art by reference to the patent already considered, as well as by reference to the examiner's citation, in his last rejection as recorded in the File Wrapper, to "the ordinary method of laying cement sidewalks"; but it is shown in the Haddock patent, Defendants' Exhibit H, as the examiner holds in his said last action, and is shown besides in the Malette patent, Defendants' Exhibit W.

HADDOCK PATENT—DEFENDANTS' EXHIBIT H

The Haddock patent, because of its importance, has been reserved for the last patent to be considered under the present head.

Its importance is found primarily in the fact that the examiner based his final rejection directly upon it, and that Shope accepted his patent subject to the restriction thereby imposed upon it.

> Boss Mfg. Co. v. Thomas, 182 Fed. 811, p. 813 and authorities there cited.

We also maintain that it discloses a complete anticipation of the Shope patent in every material and operative feature.

For facilitating the reading of the Haddock patent, it is well to suggest at the outset that the drawing thereof shows "a cross-section of a preferred form of block as made by my method" (Haddock, Spec., page 1, lines 40-41). Without this precaution, the drawing might prove confusing by reason of its being easily mistaken for a perspective view.

Now, Haddock forms his block (stratum C) precisely as both plaintiff and defendants do, by placing in the bottom of a mold (Ib. line 67) a mixture of materials comprising Portland cement, sand, and water in such proportions as to leave "the mass in a moist rather than wet condition" (Ib. line 76). The said mass "is then thoroughly tamped and compressed" (Ib. lines 80-81.) "The material thus tamped becomes solid and firm" (Ib. lines 84-85). Haddock, therefore, of itself, makes complete disclosure of Shope's "moist or semi-dry" block.

Beginning in line 89 of his specification, Haddock continues:

> "I next sift or spread on the exposed face of the compressed material a coating of pure cement, either natural or artificial. I then moisten this coating. The amount of material used in this step is sufficient to form a complete coating or covering *and it constitutes a stratum impervious to water.*"

The language last quoted calls for the application to the block C *first* of cement and *afterwards* of water sufficient to moisten the coating B (Ib. lines 91-92). It will hardly be seriously contended that there is any material difference between a method which calls for first applying cement and afterwards the water as Haddock does, and a method involving only the reversing of the order of the application of those ingredients. The result in each

instance is the same. In any case, the reverse order of such application is described in lines 30-37 of the patent to Goode, Defendants' Exhibit F. It is certain that no proof of any difference in the methods is attempted, for the obvious reason that it would defeat plaintiff's theory upon which infringement is predicated. Shope himself testifies (Record, p. 84) that it is immaterial whether the water goes on before the cement or after it. It may be, therefore, fairly accepted that one mode of application is the full equivalent of the other.

Plaintiff does, however, contend, apparently in all seriousness, that because Haddock shows his waterproof stratum B enclosed between two strata A and C, the same *method* of making a waterproof stratum claimed in the Shope patent is patentably different from the Haddock *method,* for the sole reason that Shope *applies* his so-called waterproof coating to the outside of a cement block, instead of to some other part of it. If the idea of an outside waterproof coating were new, or if Shope's claim were for a product—a brick, for example—there might, perhaps, be some grounds for insisting upon the merit even of such a distinction; but as the case stands the distinction does not apply, and there is no force whatever in the contention. Shope has no claim to a product; and the idea of an outside waterproof coating was old, as the patents to Goode and Davies abundantly show.

The only problem the Shope patent offers to solve was that of making a cement block waterproof.

That problem, we repeat, Haddock had solved in 1894, when he filed his application fifteen years ahead of Shope. Even conceding, *arguendo,* that Haddock does not propose in so many words to make the *outside face* of a block waterproof, yet he does propose (line 95) to provide a block with "a stratum impervious to moisture," and shows every step of the alleged Shope method. Suppose that a "Shope brick" having a waterproof face on one side were set with said face on the inside of a wall, would that alter the case in respect to the method of making the "Shope brick"? Yet plaintiff in this case would seriously contend that the mere selection of a particular part of a brick for the application of his process will support his patent. When Haddock has applied his stratum B to his stratum C he has made a "waterproof faced cement block," substantially all that Shope claims, and by the very method Shope describes. The only distinction is that Shope prefers to ultimately employ his so-called waterproof stratum for the outside face of his block, while Haddock, after he has made a "Shope block," through application of his stratum B to stratum C, elects to cover stratum B with another stratum A. This involves no change of method or result in respect to the combination of B and C, but only an *addition* to that combination.

Mr. Werner, plaintiff's expert witness (Record, pp. 203-4), does indeed attempt a fine-spun differentiation of the disclosure of the Haddock patent from Shope's alleged invention, but therein he disregards

the fact that Shope claims to have discovered nothing more than a new method. His *ad captandum* argument directed to consideration of a *ham sandwich* (Record, p. 205), however homely and confiding reference thereto may be, is inept, since there never was any sort of a mystery in the making of a ham sandwich. Even a ham sandwich with one outside layer left off would still be a ham sandwich, *pro tanto;* but the witness manifestly labors heavily to carry the load *"for my client"* (Record, p. 197). The same witness, in his zeal for *"his client,"* eventually loses himself in a fine abstraction to which this court will hardly subscribe, namely, that *a valid patent may subsist solely in a manner of description rather than in the invention described.* That is what the eminent expert, Mr. Werner, says, substantially in so many words, when, commenting upon the Shope patent, he attempts to distinguish the subject matter of that patent from the prior art. (Record, pp. 184; 199, last Ans.; 203-4; 206, first Ans.; 211.)

Our contention is that the evidence afforded in the Record, in the File Wrapper and Contents, and in the patents heretofore considered, shows that the alleged invention described and claimed in the Shope patent is, in all substantial and material respects, disclosed in the art subsisting prior to any date of invention alleged by Shope.

Shope was operating in an old and crowded art, and advances no evidence to support any pretention to being regarded as a pioneer inventor.

The proposition of law upon which we mainly rely to support said contention is set forth by the Supreme Court in the following language:

> "It is settled by many decisions of this court, which it is unnecessary to quote from or refer to in detail, that the application of an old process or machine to a similar or analogous subject *with no change in the manner of application and no result substantially distinct in its nature,* will not sustain a patent, even if the new form of result has not before been contemplated." (Cases listed.)
>
> Pennsylvania R. R. Co. v. Locomotive Truck Co., 110 U. S. 490; 28 L. Ed. 222, at 223.

In a later case the Supreme Court, to like effect, says:

> "The Olmstead patent, therefore, covers an old process applied to the same subject, with no change in the manner of applying it, and with no result substantially distinct in its nature."
>
> Western Electric Mfg. Co. v. Ansonia Brass and Copper Co., 114 U. S. 447-453; 29 L. Ed. 210, at 211.

Knapp v. Morss, 150 U. S. 221; 37 L. Ed. 1062, to the same effect, also holds, page 229, there can be no infringement if defendant leaves out a single element of the patentee's combination.

It appears from the foregoing decisions that a *patent for a process must cover* one which comprehends *change in the manner of application and a result substantially distinct in its nature,* or it cannot be sustained. This is elementary patent law.

The plaintiff herein has made showing neither of a change in the manner of the application of an old process nor of a result substantially distinct in its nature.

Wherefore, we maintain that the patent sued on is invalid.

Deeming the foregoing conclusion to be inevitable, we were content at the trial to rest the case mainly upon that alone; but since the court below has sustained the patent, we are constrained thereby to argue the matter more at length upon appeal.

II.

NO INVENTION DISCLOSED IN PATENT SUED ON

Admitting, contrary to our conviction and solely for the sake of argument, that the substance of the Shope patent is not actually anticipated in the prior art, we nevertheless maintain that, in the eye of the law, nothing shown by the patent involves invention, and that the patent is therefore invalid, independently of any other consideration. The points of law upon which we rely are, we believe, well established in the authorities below noted.

That nothing less than invention will sustain a patent is clear. The patent statute (R. S., Section 4886) provides only that a patent may issue to "any person who has *invented* or *discovered* any new and useful art, machine, manufacture or composition of matter, or any new and useful improvement thereof."

That the subject matter of every patent must be the creation of nothing less than invention appears from the statute itself, and is recognized by all the courts.

Thompson v. Boisselier, 114 U. S. 1; 29 L. Ed. 76.

Pearce v. Mulford, 102 U. S. 112; 26 L. Ed. 93.

In the case of Atlantic Works v. Brady, 107 U. S. 192; 27 L. Ed. 438, at page 440, Justice Bradley, in an opinion which has become classic, sets forth some of the distinctions between what is invention and what is not, in the following forceful and instructive language:

"The process of development in manufactures creates a constant demand for new appliances, which the skill of ordinary head workmen and engineers is generally adequate to devise, and which, indeed, are the natural and proper outgrowth of such development. Each step forward prepares the way for the next, and each is usually taken by spontaneous trials and attempts in a hundred different places. To grant to a single

party a monopoly of every slight advance made [in the instant case there is no advance], except where the exercise of invention, somewhat above ordinary mechanical or engineering skill is distinctly shown, is unjust in its principle and injurious in its consequences. The design of the patent laws is to reward those who make some substantial discovery or invention, which adds to our knowledge and makes a step in advance in the useful arts. Such inventors are worthy of all favor. It was never the object of those laws to grant a monopoly for every trifling device, every shadow of a shade of an idea, which would naturally and spontaneously occur to any skilled mechanic or operator in the ordinary progress of manufactures. Such an indiscriminate creation of exclusive privileges tends rather to obstruct than to stimulate invention. It creates a class of speculative schemers who make it their business to watch the advancing wave of improvement, and gather its foam in the form of patented monopolies, which enable them to lay a heavy tax upon the industry of the country, without contributing anything to the real advancement of the arts. It embarrasses the honest pursuit of business with fears and apprehensions of concealed liens and unknown liabilities to lawsuits and vexatious accountings for profits made in good faith."

A statement to like effect was made by Judge Phillips in the case of Tiemann v. Kraatz, 85 Fed. 439.

Indeed, nearly a hundred cases involving that rule have now (1917) been adjudicated.

Walker on Patents, (5th Ed.) page 27. Cases collected in note 18 on said page.

"Industry in exploring the discoveries and acquiring the ideas of others; wise judgment in selecting and combining them; mechanical skill in applying them to practical results; none of these are creation. None of these enter into the inventive art."

Robinson on Patents, Vol. 1, page 117.

The question of invention is always a question of fact and not a question of law.

Pappenhusen v. Fakke, 5 Blatch. 49.
Shuter v. Davis, 16 Fed. 564.
Keene v. New Idea Spreader Co., 231 Fed. 701.

But these questions of fact are to be determined by means of the rules of law.

Walker on Patents, (5th Ed.) p. 59, par. 42.

Questions of novelty are also questions of fact.

Battin v. Taggert, 17 How. 77; 15 L. Ed. 37.
Turrill v. Railroad Co., 1 Wall. 491; 17 L. Ed. 668.

In the Packing Company Cases, 105 U. S. 566, 571; 26 L. Ed., p. 1174, Mr. Justice Woods said:

"All *improvement* is not invention, and *entitled to protection* as such. Thus, to entitle it, it *must be the product of some exercise of the inventive faculties,* and it must involve something more than what is obvious to persons skilled in the art." (Citing cases.)

Having in the line of authorities premised so much, it is next in order to consider what is the invention alleged in the Shope patent.

Intending to omit repetition of any part of what has been already set forth under the Head I herein, we assume it to be established beyond controversy that Shope proposes to take an old cement block "of suitable material in a semi-dry state"—to quote from claim 1 of the Shope patent—and to form thereon a waterproof face by the application of cement and water, *either without agitation,* as in claim 1, *or with agitation,* as called for in claim 2. The only way of applying cement and water to a block is to apply it, to paraphrase Senator Sherman's celebrated observation upon the question of "resumption." The one word "applying" in the one instance, exhausts the subject; and the single word "agitation" exhausts it in the other instance, if indeed "agitation" were not actually anticipated in the prior art, as shown for instance in the Thomas patent, lines 47-54.

"Applying" and "agitating" are both munificently shown to be old in the art. The only possible variation of the method of application would be to apply

the water and the cement separately one after the other; but that, too, is old. Haddock applies the cement first and the water afterwards. Goode first provides the water and then the cement. There was nothing of novelty, much less of invention, left for Shope to put into his patent; but all he ever relied on was to apply water first and then add cement to the water. That, we submit to be a variation too obvious to dignify by the name of invention. Unless he make good his assertion, as he has failed to do, his suggestion of a new function effected by the variation is neither more nor less than what the examiner in his rejection of April 19, 1910 (Record, pp. 236-7), declares to be old, and what Shope by amendment thereupon concedes to be old.

III.

PATENT SUED ON IS INOPERATIVE

It may be proper to state here that we use the term "inoperative" throughout this brief in the sense in which it is commonly used and understood in ordinary patent parlance.

If plaintiff would stick to the argument (Record, pp. 239-240) which, alone, induced the Patent Office to allow the patent, the case would be different from the one presented here; but that argument is in the instant suit abandoned utterly. The argument advanced before the Patent Office in support of the amended claims is, that by first applying water to the block, and then adding cement to the water,

there is obtained, in some way not disclosed, a new result, namely, penetration by the cement of the pores or interstices of the block. That argument evidently had weight with the Patent Office examiner. Because of his being one skilled in the art, he must have recognized the mere statement for a paradox, which it is. It was so paradoxical as to have made it the duty of the examiner to demand proof of the truth of the statement. Such a demand would be in accordance with precedent well recognized in the Patent Office, where there is a standing requirement that demonstration of operativeness must be made in any application for patent for a machine purporting to involve the principle of "Perpetual Motion." The two instances differ only in respect to the fact that the idea of perpetual motion is an obsession of the mind which keeps laying hold upon different individuals. That it is possible by any means to cause cement to penetrate the interstices of a cement block made of compacted sand, cement and water, although peculiar to Shope, is as incredible to one skilled in the art to which it belongs, as any dream of perpetual motion that ever entered the human brain.

Had the Patent Office demanded proof of operativeness in this case, we make bold to say this patent would never have issued; but no such demand was made. The Patent Office merely accepted an unsupported *ex parte* statement, and allowed the application to go to issue on that statement.

Nevertheless, without any proof at any time of operativeness, which was strenuously denied at the trial, *plaintiff* now even *seeks to enlarge the claims of his patent* to cover the acts of defendants in doing no more than what the court may take judicial cognizance of being within the right of everyone to do, namely, spreading mortar on a brick.

In order that the court may understand beyond a doubt that there is no extravagance in the last statement, its attention is invited to Shope's testimony (Record, pp. 78-79), where he states:

"Q. You have testified that your invention is conceived by you to have consisted in incorporating more water in semi-dry brick, is that right?

A. On the face.

Q. Please explain just what you mean by that, so the court will understand it.

A. By puddling the face of the semi-dry product with additional water, or trowelling.

COURT: Trowelling into the surface?

A. Trowelling, floating, stippling, whatever the *addition* might be.

Q. The covering of a surface made of porous material, or specifically of cement mixture, with a trowelled coating was not new at that time, was it?

A. I never had heard or seen of it, or any green product faced in like manner, or I would not have

sworn to be the true and original inventor of my patent.

Q. Then you conceived at that time that you were the first one to trowel a coating upon (a) cement base?

A. Upon a cement brick or block.

Q. You draw a distinction between a cement brick and a sidewalk, for instance?

A. I certainly would."

Contrast that "distinction" with Shope's attitude towards the examiner's rejection (Record, pp. 237-239).

But humoring the argument even further, if *the mere application* of a mixture of cement and water to a cement block will of itself result in causing the cement to follow the water into the interstices of the block, that very application was made years before Shope pretends to have entered the field of invention.

Plaintiff's main witness, Mr. Werner (Record, p. 210, lines 15-16), referring to Defendants' Exhibit L, Davies patent of 1902, testifies: "You would get *exactly* the *same result* Shope does, provided you dip intelligently."

Defendants' Exhibits F, G, H, V and W each, as well as said Exhibit L, show precisely such application. Besides, Ward (Record, p. 142), Starks (Record, p. 132), and Fleming (Record, pp. 116, 123), each in turn testifies that *such application is very old in the art.*

We agree with Mr. Shope, as he is last above quoted, that there is no difference in the result obtained in respect to applying cement and water to a porous block, between the method of applying water first and the cement afterwards, and the method of first applying the cement and afterwards the water. The methods are substantially one and the same.

We go further, however, and deny that it is possible to cause cement to enter the pores, interstices or voids, which are present between particles of sand alone when the same are compacted in mass. If the mass of sand alone is enriched by addition of cement and enough water is added to act upon the cement, which is Shope's block before it is faced, the obvious result will be to fill up some of the voids which were present in the sand alone, without cement, and insofar to reduce the permeability of the composite mass.

The fact that cement will not enter the interstices aforesaid is testified to by defendants' witnesses Starks (Record, pp. 131-5-6-8), and Fleming (Record, p. 119), as well as by defendant Ward (Record, pp. 144-5). Dr. R. K. Strong, professor of chemistry at Reed College, not only testifies, after experiment, to the fact (Record, p. 157), but gives (Record, pp. 157-167, 170) undisputed scientific reasons to account for the fact, in substance as follows:

> Cement does not dissolve in water, but when added thereto is held in suspension therein so

long as the mixture is liquid. If the cement entered into solution in the water the liquid would be homogeneous and would penetrate the pores or interstices aforesaid as readily as water does; but A MIXTURE OF CEMENT AND WATER DOES NOT FORM A SOLUTION. Therefore, the particles of cement being carried in suspension in the water, and each particle being a solid relatively larger, in each instance, than said pores or interstices, cannot enter them.

Professor Strong explains that a mixture of cement and water is, in effect, a muddy water towards which a mass of compacted sand acts after the manner of an ordinary filter to clarify the water of the mixture by separating the cementitious silt out of it.

The familiar instance of the filtration of water by passing it through sand, as in the old sand filter which was formerly in common domestic use, is a fact of which the court may well take judicial notice. The court is doubtless acquainted, likewise, with filters of the Pasteur filter type, which have been in familiar use for forty years. They act precisely like the old sand filter, and differ from it only in the employment as a substitute for the sand of a filtering medium of "biscuit" which is baked fictile material in its unglazed porous state, or instead thereof artificial or natural stone. The result effected is not only an economy of space, but a degree of filtration that excludes even microscopic animalculi as well

as visible solid matter. Now, plaintiff's cement block is, in the art to which it belongs, generally known as "artificial stone," as patents of record, for example, Defendants' Exhibits F, G, V and W, abundantly prove.

We, therefore, deem ourselves to be safe in saying, as we do say to this court, that the proposal the Shope patent presents, of causing water "to carry the cement into the pores" of his block (Shope patent, line 70), is absolutely a paradox. Nothing to support it has, nevertheless, ever been even so much as advanced.

Mr. Werner's testimony (Record, p. 176), that the cement of a cement and water mixture, will enter the "voids" of a cement block *if they are large enough to admit them,* though vague on this point and hardly disingenuous, is true of course in a broad sense, as Dr. Strong (Record, p. 170) frankly states; but if his endeavor to expand the plain meaning of the term "pores" or "interstices" of a block composed of sand, cement and water, so as to include voids large enough to admit the entrance of cement, should succeed, it would at the same time throw this case out of court, because a term so broad would include the subject matter of the Hassam patents.

The Hassam patents were not set up in the answer, but they are fairly in the record. They were referred to at the trial by counsel for plaintiff (Record, p. 133), and in reply to objection by opposing counsel, Judge Bean (Ib.) observed:

"I suppose counsel assumes that most people know what Hassam pavement is."

The assumption is somewhat anomalous; but, howbeit, the reported case entitled Hassam Paving Co. v. Consolidated Contract Co., 215 Fed. 114, is accessible to the court. Said case makes clear the nature of the said patents, three in number, and, also, through their identification by their numbers, that each of them antedates the Shope patent. In that case Judge Bean, at page 115, says:

"The manner of constructing the pavement, as described in the patents in brief, is: First, covering the sub-grade of the street or road with a layer of uncoated broken stone and compressing the same by a heavy steam roller, *thus reducing the voids to a minimum.* Second, after the stone has been thus compressed, it is grouted by pouring over it in place a mixture of cement, sand and water and agitating the same by a steam roller during the process of grouting until the grout flushes to the surface, thus expelling the water and filling out the voids or spaces between the stones with grout."

In respect to the Hassam pavement there is no difficulty in carrying the grouting, which is simply cement, sand and water, as stated above and again on page 116 in said decision, to enter the voids in the "layer of uncoated broken stone" to which it is applied in constructing the Hassam pavement. The

voids there are large enough, to be sure, to admit the grouting, but they do not present the problem which confronted Shope when he sought to obtain his patent. If the problem had not been recognized by the Patent Office to be a distinct one, Shope's patent would not have issued. His application therefor would have been rejected, of course, on the Hassam patents.

As differentiated from Hassam, Shope states definitely in his patent, lines 55-57: "In the present method the block is first formed in the usual manner by mixing sand and cement." It is unnecessary to quote more. He is careful not to limit the constituents of his face-forming materials to neat cement, but not so in respect to the block itself. That, he specifies is made of sand and cement, and the bricks introduced by him in evidence are made of those materials.

It is therefore clear, we submit, beyond controversy that Shope proposes to cause cement to enter the minute pores or interstices of a block, said block being made by mixing moistened sand and cement pressed and tamped in a mold.

THE STEVENS PATENT—DEFENDANTS' EXHIBIT A

While we deem it equally clear without further evidence than that already referred to, that what Shope proposes to do cannot be done, yet it happens that even a negative is substantially proved

in this case by the patent to Charles W. Stevens, No. 624,563, dated May 9, 1899, Defendant's Exhibit A.

The Stevens patent, it should be premised, was sustained after litigation protracted during many years through all the courts, the Supreme Court having refused to issue a certiorari.

We have, because we considered it highly instructive, gone to considerable trouble and expense to obtain a certified copy of the record of the Stevens case presented in the Circuit Court for the District of Massachusetts, and sought to offer it in evidence (Record, pp. 152-155), so that we might read parts of it into the record at the trial, but the Judge excluded it (Ib., p. 155), stating that it could be used in argument, if desired. We have it here, if the Court wishes to consider it.

However, the case is reported in sufficient necessary detail, in the case entitled *Emerson & Norris Co. v. Simpson Bros. Corporation,* 202 Fed. 747. It is significant that it resembles the present case in that the true nature of the invention was arrived at with difficulty. Judge Hale of the trial court did not appreciate it, but his decision the court of appeals reversed.

In that case, Judge Putnam, speaking for the court of appeals for the First Circuit, recites (p. 748) claim 1 of the patent, reading as follows:

> "'1. The process of forming artificial stone consisting in molding the stone compound while

in a plastic or semi-liquid state in or on a mold formed of relatively dry sand and then allow the mass to set until the sand absorbs the surplus moisture from the compound, thereby converting the latter to a solid or nonliquid form, substantially as and for the purpose set forth.' "

Immediately following the claim appears the following language:

"The peculiar features of this claim are that the mold is formed of 'relatively dry sand,' which 'absorbs the surplus moisture from the compound.' It might seem to a non-expert doubtful whether this method of molding could succeed; but not only the complainant shows that it did succeed, but the respondents' attempts to make use of it confirm the complainant's position in this respect."

At page 751, Judge Putnam, reaching a conclusion, says:

"The evidence makes clear that the 'workmen were forming molds of relatively dry sand, using wooden patterns,' and that they poured the mixture 'into the molds which they had formed in the sand'; and such clearly was the entire process as shown by this witness. Of course, as we have already said, the question at once arises in the lay mind whether this would be an effectual process; but the leading expert for the complainant, Carpenter, testified as follows:

"'The fact that a dampened sand mold would hold its shape and at the same time absorb water so as to compact a nearly liquid stone compound is certainly a phenomena, which would never have been believed had it not been tried. * * *

"'This discovery, which is set forth in the claim of the Stevens patent in suit, was the first disclosure to the world of the process of making an artificial stone of a homogeneous structure resembling natural stone, and in many ways superior to natural stone, and which was adapted for use in building of the best style of architecture.'

"Therefore this was plainly the entire process of the patentee."

The Stevens patent, as explained by the aforesaid decision sustaining it, we confidently submit, not to prove anticipation of the Shope "invention," but to show that what Shope claimed to be able to do cannot be done, that the Shope patent is, in fact, inoperative. The report of the litigation of the Stevens patent, as recognized by the highest courts, shows that a large industry was built upon the Stevens invention whose principle of operation contradicts the theory advanced in the Shope patent. The Stevens patent and the Shope patent, by the very physical nature of the substances upon which each relies to reach contradictory ends, respectively, cannot both be valid.

Shope claims that if a mixture of cement and water be applied to a porous cement block which he specifies to be made of compacted sand, cement and water, the cement of said mixture will enter the pores or interstices of the block. Stevens claims, and satisfies the Courts by proof, that a sand mold, which is by nature more porous than Shope's block, will exclude the cement of the mixture so as to mold "the stone compound wholly in sand." (Stevens patent, p. 3, lines 55-56.)

If the Stevens patent is valid, as it has been held to be, the Shope patent is invalid, because the validity of the Stevens patent has been sustained as it must be if at all, upon the recognition of a physical law whose operation contradicts that theory which is necessary to support the Shope patent, and plaintiff, even in the face of the Stevens patent, offers no evidence so much as tending to support Shope's theory. That fact together with the undisputed proofs adduced in the instant suit, *supra* pp. 47-49, and the recognition by the courts of the validity of the Stevens patent should, we think, prove, to say the least, most persuasive, and to all intents convincing.

Wherefore, we submit that the Shope patent is inoperative, and is, for that reason, if for no other, invalid.

IV.

DEFENDANTS DO NOT INFRINGE

Despite Judge Bean's statement in the second sentence of the second paragraph of his opinion that

there is "no room for controversy about the infringement" which he holds to be proven, we insist that the logical conclusion must be directly opposite thereto, namely: that there is no infringement in this case. That conclusion is supported by the presumption of innocence to the benefit of which defendants are entitled.

If the grounds upon which the opinion of validity of the patent rests are unsound, as we hold them to be, in the particulars hereinbefore set forth, it follows that they would lead to an erroneous conclusion upon the question of infringement. To put the concrete case, if the patent sued on is entitled to that breadth of construction which plaintiff contends for and which the Court below gave it, then, we say in all candor, that of course defendants are infringers. It is admitted that defendants were making cement bricks when they were enjoined in this suit; but plaintiff does not and cannot deny that they had a perfect right to make a cement brick or block simply by forming and tamping it in a mold. That manner of making such an article Shope concedes in his patent (lines 55-58) to have been "the usual manner" at the time he made his application. Therefore the charge of infringement made against defendants must rest, not upon their manner of making a brick, but, upon the manner of treating it after molding it in order to form upon it what Shope calls a waterproof face.

There is no controversy as to the fact that in order to make such a face Shope "applies" a coating con-

sisting of a mixture of cement and water to a molded brick; that the defendants apply the same sort of a coating to a molded brick; and that the result may be in each instance regarded as one and the same.

It is this apparent identity of process and product in respect to a method *as practiced* by both parties to this suit which deceived Judge Bean; but what plaintiff does actually practice, and what he is entitled to monopolize by patent, are two very different things.

It must be shown, not that defendants do what plaintiff *does,* but it must be made to appear that they do what plaintiff has the legal right under the terms of the patent sued on to exclude them from doing.

Infringement of a patent in any given case must be predicated upon the precise scope of the patent in the eye of the law. The said scope of the patent can only be ascertained first by critical analysis of its subject-matter, and afterwards submitting it to judgment by comparing it with the prior state of the art, because, logically, judgment itself "consists in the comparing together in the mind of two objects of apprehension and pronouncing whether they agree or disagree."

In the language of the opinion rendered below, there is not evidence that the court bestowed critical attention upon either the terms of the patent sued on, or upon the prior art upon which, under the law, the patent is predicated. The Court below

says: "Now the patent is the first one issued covering *this method or process.*" It goes on to declare *'the process* described in plaintiff's patent is not any where disclosed directly by the prior art." Both of those statements are premises which must be true in order to support the conclusion. What the method or process described and claimed in the patent sued on is, does not anywhere appear to have been properly determined. Otherwise, it would have been, we venture to assert, impossible for the court to have been led into the error into which it has fallen. Had proper analysis of the claims been made, it would appear beyond possible doubt that the patent is limited at best to a narrow method or line of procedure, and one quite beside any course pursued at any time by defendants.

What defendants did is not controverted. It was simply to spread upon a brick, and purposely to avoid agitation (Record, p. 141), a thin coat of mortar, made by mixing together cement and water on a mortar board. Transfer of the mortar from the board to the brick was effected by the use, *in the usual way,* of an ordinary plasterer's steel trowel. The said process is so old that the mind of man runneth not to the contrary. It is the very common law of the plasterer's handicraft.

> "A process, like a combination, is an entirety, and the charge of infringement in such a case is not made out unless it is alleged and proved that the entire process is employed by the respondents."

Gould v. Rees, 15 Wall., 82 U. S., 187-195;
21 L. Ed., 39-41.

It is of no material consequence that the face coating is applied to a green brick or block because, as we show elsewhere from the Record (*supra* p. 32), neither a green block nor the waterproof face coating of a green block was anything new in the art when application was made for the Shope patent.

Moreover, the operation of curing a green brick or block consists only in drying the moisture out of it. The drying of a cement block does not change its structural formation, does not in any wise alter the pores of interstices necessarily left between the particles of which it is composed, however closely they may be compacted, as by tamping for instance. If Shope had indeed invented, as he claims to have done, a method of causing water "to carry the cement into the pores" of a green brick, the same method would effect the same result if applied to a porous dry brick.

Wherefore we insist once again that Shope is asserting a claim broadly to the art of plastering the face of a brick—that and nothing more.

DECEPTIVE APPEARANCE OF PENETRATION

No doubt the attempt will be made to convince the court, by reference to the material exhibits in the case, that the Shope method effects penetration of the pores of a block; but the argument is altogether a

specious one. It may appear that there is a difference, however slight, in the thickness of the face of the coat of plaintiff's and defendants' bricks, and plaintiff would have it believed that the difference is proof of what is claimed for the Shope method, namely, penetration of the pores of a block. That is not true. If it were, how could such difference exist if plaintiff and defendant employ the same method as the former alleges? The apparent difference referred to exists now and then, not necessarily but not unfrequently, but is wholly due not to penetration of the pores of the brick by the cement of the coating mixture, but to an entirely different cause. That cause produces no beneficial result, but if it did, it is not claimed in the patent. On the contrary, that cause is directly at variance with the claims of the Shope patent. It results not from penetration of the pores of the block by the cement of the face coating, but results from a stirring up by violent agitation of particles of sand from the block and commingling of them with the cement slurry or mortar mixed In Situ according to Mr. Werner's testimony (Record, p. 194). Precisely the same *appearance* would result from employment of a face coating consisting of an initial mixture of sand with the cement as the Shope patent (line 63) contemplates. There is no advantage but rather detriment in the stirring up of the sand derived from the face of a block by agitation and the consequent commingling of it with the material of the plastic face coating; and it is to avoid that very result that defend-

ants purposely employ a steel trowel and a light stroke thereof as defendant Ward's testimony shows (Record, p. 141).

Just here it is deemed that the statement made elsewhere herein will bear repetition for the sake of emphasis, namely, that the Shope patent purports only to be drawn to an improved art—a method—and not to any product whatsoever.

For commentary on that fact, definition of a process in contemplation of law, and, by contrast, the legal distinction between a product and a process are deemed to be not superfluous here, although we are well aware that such matters are elementary and familiar to the mind of the Court.

Justice Bradley, for the Supreme Court, says:

> "A process is a mode of treatment of certain materials to produce a given result. It is an act, or series of acts, performed upon the subject matter to be transformed and reduced to a different state or thing."
>
> Cochran v. Deener, 94 U. S., 780; 24 L. Ed., 139, p. 141.

That a process and a product are two different inventions, see

> Robinson on Patents, Vol. 1, Sec. 167, last paragraph, note 1, where authorities are collected.

That method and product are separable inventions, supporting separate patents one of which may be valid and the other not, see

> Dunn Wire-Cut Lug Brick Co. v. Toronto Fire Clay Co., (6 C. C. A.), 259 Fed. 258-265 (p. 261); citing Rubber Co. v. Goodyear, 76 U. S. (9 Wall) 788; 19 L. Ed. 566.

The necessity for observing DISTINCTION BETWEEN PROCESS AND PRODUCT PATENTS is noted by the Court of Appeals for the Third Circuit in the following language:

> "But before inquiring what the patent is for, it is well to understand clearly for what it is not, namely, that it is not and does not purport to be for a product. In other words, it is a process, and not a product, patent. It is, as the patent states, for a 'process of manufacturing armor plates'. *This distinction between process and product patents must be kept in view in considering patents, such as are here involved, otherwise we are apt to conclude from the mere fact that similar products are made by two different persons that one is infringing the other's rights. On the contrary, in such cases, the real test of infringement is not identity of a product, which is not patented, but identity of patented process in producing an unpatented product.*"
>
> Fried, Krupp Aktien-Gesellschaft v. Midvale Steel Co., 191 Fed., 588-612 (p. 594).

SUMMARY

By way of summary of some of the points raised, counsel for defendants submit the following conclusions arranged according to the several heads under which they are discussed at length in the foregoing pages, and to which, *seriatim,* reference is made for explication hereof in detail.

I. The patent sued on is invalid because its subject matter is fully anticipated in the prior art.

II. The patent sued on is invalid for the specific and sufficient reason, besides the broad question of anticipation discussed under the first head, that it discloses no *invention,* in view of the state of the art which antedates it.

III. The patent sued on is invalid because the invention it purports to describe and claim is wholly *inoperative* to effect the result it is alleged to effect or any novel result whatsoever.

IV. Defendants do not infringe the patent sued on, because they *have not at any time employed the method* DESCRIBED AND CLAIMED in said patent.

Respectfully submitted,

ATKINS & ATKINS,
Attorneys for Appellants.

UNITED STATES PATENT OFFICE.

EDWARD GOODE, OF BARTOW, FLORIDA, ASSIGNOR OF ONE-HALF TO THOMAS A. GOODE, OF SAME PLACE.

ARTIFICIAL STONE

SPECIFICATION forming part of Letters Patent No. 518,239, dated April 17, 1894.

Application filed August 30, 1893. Serial No. 484,390. (No specimens.)

To all whom it may concern:

Be it known that I, EDWARD GOODE, a citizen of the United States, residing at Bartow, in the county of Polk and State of Florida, have invented certain new and useful Improvements in Artificial Stone for Monuments, &c.; and I do hereby declare the following to be a full, clear, and exact description of the invention, such as will enable others skilled in the art to which it appertains to make and use the same.

My invention consists of an artificial stone especially adapted for use in the making of monuments,—and in the process of making the same. For the main portion, or body of the stone I employ clean white sand, or marble dust, entirely freed from soil or other foreign substance, and pure Portland cement, the proportions of these ingredients being from one to two parts of sand to one part of the cement. These ingredients I thoroughly mix in a dry condition, and then add thereto sufficient water to make a stiff mortar, which when of the desired and of a uniform consistency, is placed in the mold which gives the desired shape to the article being made. When the mold is full, and the surface is properly dressed to give the desired smoothness of surface, it is allowed to stand for a few minutes so that the water will gather upon the surface. I then sift pure cement upon the surface, which may be smoothed if desired after the cement has been placed thereon, and then allow it to stand until the water again collects, after which cement is again evenly and uniformly sprinkled upon the surface, and this operation is repeated several times. The mold containing the above described composition is now left for a suitable length of time, usually for about twenty-four hours, to harden. When sufficiently hard, but while yet moist, I saturate the surface with a strong solution of lime-water, care being taken to remove, by a soft rag or sponge, any surplus lime which may collect upon the surface. This saturation is repeated as often as may be necessary during two or three days and until the surface portion of the artificial stone becomes thoroughly saturated with the lime-water.

It will be observed that I do not use lime in the composition of the body-portion of the artificial stone, as I have found that this is objectionable for the reason that when lime is used the body of the stone is caused to crack by reason of the shrinkage of the lime in the process of drying, whereas when the body of the stone is made only of sand and pure cement, as described, this cracking is avoided, and a more uniform, solid and durable stone is the result. It will also be noticed that upon the body-portion of the stone is formed a skin or surface portion of pure cement. This I find to be very advantageous in that it makes a surface of great hardness, and to which can be imparted a smoothness of finish which cannot be obtained with the composition which makes up the body of the stone. A stone having the surface thus prepared is especially adapted to receive clean or clearly cut impressions from letters or other designs which may be laid thereon, and therefore is especially useful in the making of monuments upon which it is desired to place inscriptions.

In order to make the impressions in the surface, I use dies or type shaped to form letters, figures or other desired designs, and place them upon the surface of the stone, and cause them to be embedded therein to the desired extent by slight pressure.

I find that by treating the surface of the artificial stone, produced as above described, and while it is still moist, with lime-water, a marble-like effect is produced which adds much to the appearance of the stone. The whiteness which is imparted to the stone by the lime contained in the lime-water is of a lasting quality and is not affected by exposure to the weather.

In the making of monuments or other articles from the composition which I have described, I ordinarily prefer to fill the molds about half full with the composition of sand and cement, and then place in the molds iron rods, which being embedded in the article, give strength thereto without impairing its appearance.

Any suitable tools may be employed for the finishing of the surface of the stone, both be-

fore the surface coating is applied thereto, and after such surface coating has been placed thereon.

It will be understood that a desirable artificial stone is produced without the treating of the surface with the lime-water, although I prefer this step as it improves the appearance of the finished article.

Having thus described my invention, what I claim, and desire to secure by Letters Patent, is—

1. An artificial stone having a body portion of sand and hydraulic cement, and a skin of pure cement impregnated with lime, whereby the skin portion of the stone has a permanent, white, marble-like appearance, substantially as set forth.

2. The herein described process of making artificial stone, which consists in mixing together pure sand and Portland cement with sufficient water to make a thick mortar, then molding this composition, then forming a surface by sifting or placing thereon dry hydraulic cement, and then finishing the said surface, substantially as set forth.

3. The herein described process of making artificial stone, which consists in forming a body of a mixture of sand, hydraulic cement and water, then applying thereto a surface or skin of pure hydraulic cement, allowing the stone thus formed to harden, and then treating the surface with lime-water, while the stone is yet moist, substantially as set forth.

In testimony whereof I affix my signature in presence of two witnesses.

EDWARD GOODE.

Witnesses:
FRANCIS A. WOLFF,
S. M. TATUM.

A. FEDERICI.

BUILDING BLOCK.

No. 527,416. Patented Oct. 16, 1894.

Fig 1

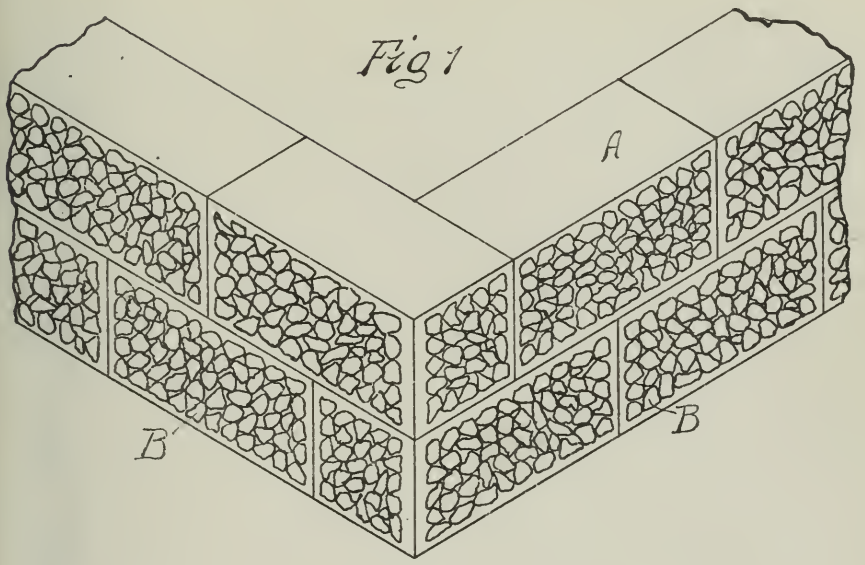


Fig 2

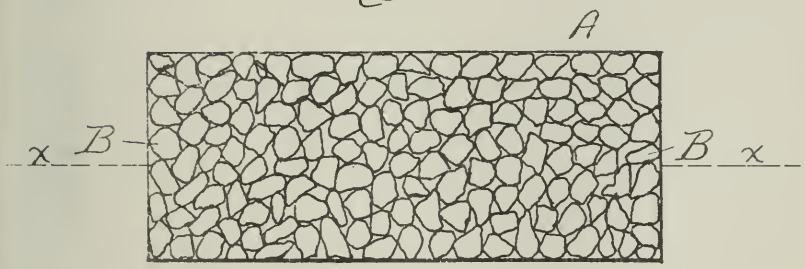
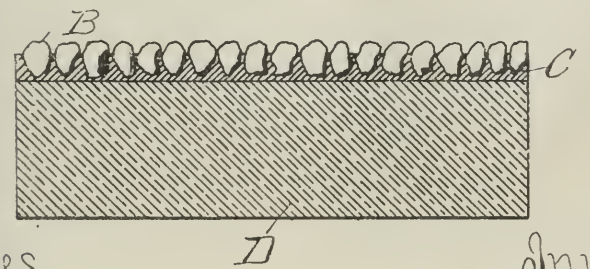


Fig 3



Witnesses

Alfred B. Watson

William M. Drew

Inventor

Antonio Federici

By John F. Kerr

Attorney

UNITED STATES PATENT OFFICE.

ANTONIO FEDERICI, OF PATERSON, NEW JERSEY.

BUILDING-BLOCK.

SPECIFICATION forming part of Letters Patent No. 527,416, dated October 16, 1894.

Application filed March 30, 1893. Serial No. 468,261. (No model.)

To all whom it may concern:

Be it known that I, ANTONIO FEDERICI, a citizen of the United States, residing at Paterson, in the county of Passaic and State of New Jersey, have invented certain new and useful Improvements in Building-Blocks; and I do declare the following to be a full, clear, and exact description of the invention, such as will enable others skilled in the art to which it appertains to make and use the same, reference being had to the accompanying drawings, and to the letters of reference marked thereon, which form a part of this specification.

The object of my invention is to provide an artificial stone for building purposes which shall be durable and ornamental and which can be cheaply and easily manufactured.

The invention consists of a stone comprising the following elements: cement, sand, and pebbles, arranged as hereinafter described and shown in the accompanying drawings.

In the drawings Figure 1 represents the corner of a wall built with my artificial stone. Fig. 2 represents the face of a stone showing the pebbles. Fig. 3 is a view of a section of my artificial stone through the line X—X, Fig. 2.

—A— represents the stone; —B— the pebbles; —C— a layer of pure cement, and —D— represents the other portion of the stone which is composed of cement and sand.

The portion —D— of the stone is composed of Portland cement and the best sharp sand, which I mix in suitable proportions and make or mold in any suitable size or shape. I then prepare some pure Portland cement and spread a layer thereof upon that exposed surface of the portion —D— which is to form the face of the stone. While the material is yet plastic, assorted pebbles, B, are partially sunk into the central part of the face or faces of the stone, a margin on said face being left unpebbled as clearly shown in Fig. 1, although it is obvious that the whole surface, as shown in Figs. 2 and 3, may be covered without departing from the spirit of my invention. The block is then left until it hardens.

Fig. 3 shows the composition of my artificial stone, —D— being the portion composed of cement and hard sand, —C— being the layer of pure cement and —B— being the pebbles partially embedded therein.

When the stone is thoroughly dry and hardened the pebbles —B— cannot be extracted from the layer of cement —C— without breaking them.

I propose to use my artificial stone for building purposes for which it is peculiarly adapted, as the action of the weather produces no ill effect upon it; but by bleaching the pebbles rather enhances its beauty.

I am aware that in the construction of pavements, roadways, and walking surfaces, that gravel, sand and cement have been used for uniting the blocks or cobble-stones and that in some instances materials distinguished for their sharp, hard and angular and gritty character have been used in an artificial stone or a concrete walking surface, in order to prevent slipping, &c., and in other cases where metallic gratings have been combined with an under or body of cement or concrete; but I am not aware that a building block has ever been constructed with exposed surfaces consisting of very small pebbles partially embedded in a layer of pure cement.

I am also aware of a building block formed of a cement or concrete body with pieces of tiling, glass or other hard substances embedded therein flush with the surface of the sand; but in my stone the pebbles are very small and are only partially embedded in the layer of cement upon the exposed surfaces thereof.

I am also aware that it is not new to form a block for paving streets by covering a layer of bricks with cement and embedding therein a surface layer of cobble-stones of suitable size for resisting the wear incident to heavy traffic.

As I do not confine myself to pebbles of any particular color it is obvious that in ornamental trimmings on buildings, the arches, sills or cornices may be of variegated colors; and as I do not confine myself to any special shape, my artificial stone may be used in all sorts of mason work for walls, dwellings or other buildings, in all cases the faces or exposed portions of my stone being constructed

substantially as above specified with pebbles, partially embedded in a layer of pure cement on said faces.

With the above description of my invention, what I claim is—

A new article of manufacture consisting of a building block, the body portion of which is composed of a comparatively coarse material, the face or exposed surface being composed of finer material, such as Portland cement, into the surface of which pebbles, of substantially uniform size, are partially embedded, substantially as and for the purpose set forth.

In testimony whereof I affix my signature in presence of two witnesses.

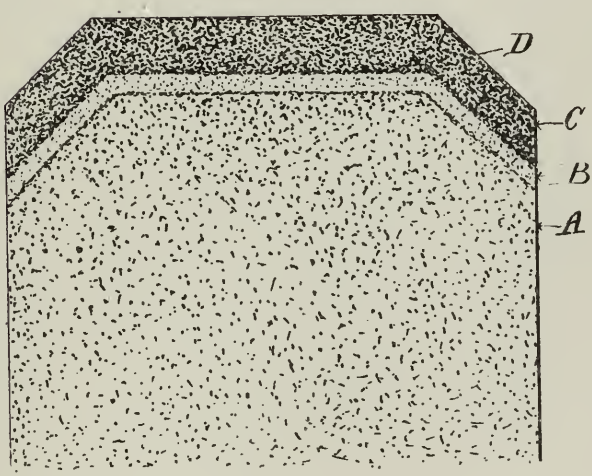
ANTONIO FEDERICI.

Witnesses:
G. J. KERR,
W. M. DREW.

W. J. HADDOCK.

PROCESS OF CONSTRUCTING HYDRAULIC CEMENT BLOCKS OR ASHLERS.

No. 531,842. Patented Jan. 1, 1895.



Witnesses
C. C. Burdine.
G. Arthur Pennington.

Wm J. Haddock, Inventor
by
Crosby & Dorian
Attorneys

UNITED STATES PATENT OFFICE.

WILLIAM J. HADDOCK, OF IOWA CITY, IOWA.

PROCESS OF CONSTRUCTING HYDRAULIC CEMENT BLOCKS OR ASHLERS.

SPECIFICATION forming part of Letters Patent No. 531,842, dated January 1, 1895.

Application filed May 28, 1894. Serial No. 512,689. (No specimens.)

To all whom it may concern:

Be it known that I, WILLIAM J. HADDOCK, a citizen of the United States, residing at Iowa City, in the county of Johnson and State of Iowa, have invented a certain new and useful Process of Constructing Hydraulic Cement Blocks or Ashlers; and I do hereby declare the following to be a full, clear, and exact description of the invention, such as will enable others skilled in the art to which it appertains to make and use the same.

This invention relates to a new and useful process of constructing hydraulic cement blocks or ashlers for the purpose of constructing or veneering walls of buildings, and it consists in the several steps hereinafter referred to and definitely pointed out in the claims.

Heretofore in the construction of cement blocks or ashlers for building purposes it has been deemed impossible to form the same by using natural hydraulic cements in conjunction with artificial or Portland cement and at the same time secure the requisite compactness and strength. It is further a well-known fact that, as heretofore made, of hydraulic cement, blocks where exposed to the elements will absorb a large amount of water, making the structure composed of them wet and cold.

The aim and purpose of this invention is to overcome such defects incident to the construction of hydraulic cement blocks or ashlers adapted for use in building or veneering purposes, by combining natural and artificial cement in one and the same block, but in different strata so that the artificial cement will be the surface for exposure, the natural cement forming the protected part of the block, thus combining great strength and economy.

In the accompanying drawing I have shown a cross-section of a preferred form of block as made by my method.

In said drawing A represents the protected part or base of the block formed of natural cement and sand.

B represents the water-proof stratum of hydraulic cement free from sand, and C represents the outer stratum or facing of the block, composed essentially of artificial or Portland cement and fine sand.

The outer corners of the blocks are chamfered as at D, each stratum being likewise constructed so that the outer stratum C is extended back partly over the sides of the stratum A. By this means when the block is used for building purposes or for building walls the outer face will simulate that of cut stone while the edges of the inner stratum A will be fully protected. By this means I am also enabled to economize in the use of artificial cement.

The method I employ in constructing these blocks is as follows:—I first take a suitable mold of the proper shape and size and of strength sufficient to withstand considerable internal pressure. The block or ashler is then built up, starting at the top first, that is to say, I first place in the bottom of the mold a stratum of Portland cement mixed with sand in the proportion of substantially one volume of cement to two volumes of sand. This amount, however, may be varied. This mass of cement and sand is thoroughly mixed and then moistened by incorporating therewith a sufficient amount of water to moisten each particle of sand and cement, leaving the mass in a moist rather than wet condition. I employ the term "moist" and wish it understood as designating a damp condition rather than a condition approximating a fluid or wet condition. The mass so treated is then thoroughly tamped and compressed, the "moist" condition of the mass preventing the water from oozing out as would be the case were the mixture over-saturated with the water. The material thus tamped becomes solid and firm. In so tamping and compressing the inner section of the block is first treated to form the concave under face as represented in the drawing. I next sift or spread on the exposed face of the compressed material a coating of pure cement, either natural or artificial. I then moisten this coating. The amount of material used in this step is sufficient to form a complete coating or covering and it constitutes a stratum impervious to water. I next take a mixture of natural cement and sand and incorporate therein a sufficient amount of water to moisten each grain thereof so that the mass will compact easily and thoroughly without the water rising or exuding. The proportions of sand and cement are one volume of cement to two volumes of sand. This amount may, however, be slightly varied. The material so mixed is then placed in the

mold over the strata of pure cement and thorough and absolute compression is placed on all parts thereof to form a solid and firm block. The mold is now inverted on a level plank or plain surface and is then removed from the block which will retain its shape and the cement is allowed to set.

It is evident that slight variations in the method described and in the article shown can be made without departing from the nature and principle of my invention.

Having thus described the invention, what is claimed as new, and desired to be secured by Letters Patent, is—

1. The method of forming building blocks or ashlers consisting in placing a "moist" mass of artificial cement and sand into the bottom of a suitable mold, thoroughly compressing the same to form a compact outer stratum or facing, coating the exposed face of the stratum with a stratum of pure hydraulic cement, placing a mass of natural hydraulic cement and sand in a mixed moist condition onto the stratum of pure cement, thoroughly compressing the same and finally removing the block from the mold and allowing the cement to set, substantially as described.

2. The method of forming building blocks or ashlers, consisting in placing a moist mass of cement and sand into a suitable mold, compressing the same, applying a coating of pure cement to the exposed face of the material in the mold, placing a moist mass of hydraulic cement and sand on the coating, compressing the same, and finally removing the block from the mold, substantially as described.

In testimony whereof I affix my signature in presence of two witnesses.

WILLIAM J. HADDOCK.

Witnesses:
FRANK T. BREENE,
GEORGE TOMLIN.

No. 624,563. Patented May 9, 1899.

C. W. STEVENS.

PROCESS OF MAKING ARTIFICIAL STONE.

(Application filed Nov. 12, 1897.)

(No Model.) 2 Sheets—Sheet 1.

Fig. 1.

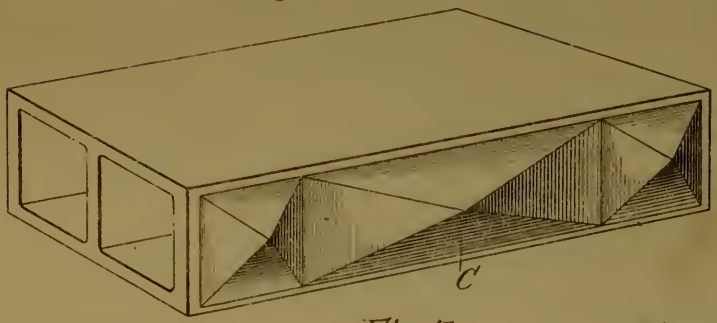


Fig. 2.

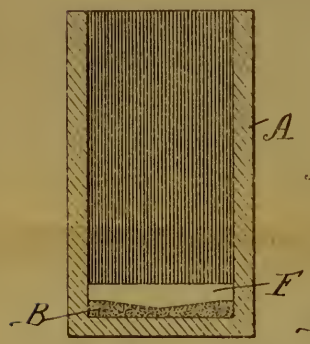


Fig. 3.

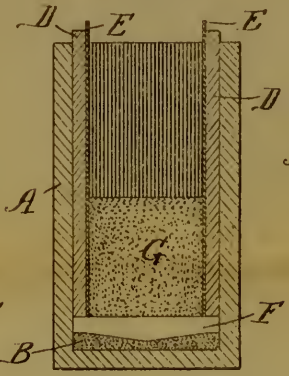


Fig. 4.

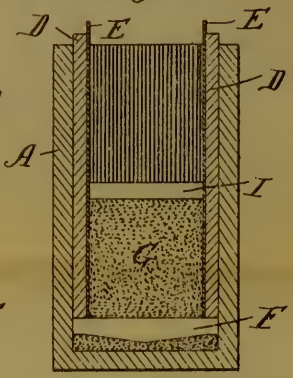


Fig. 5.

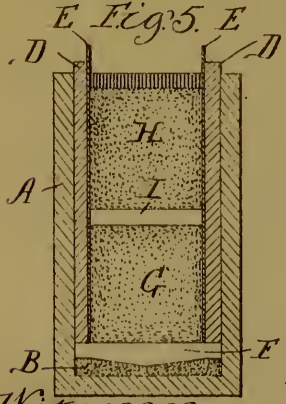


Fig. 6.

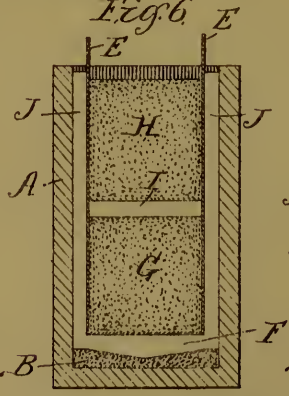
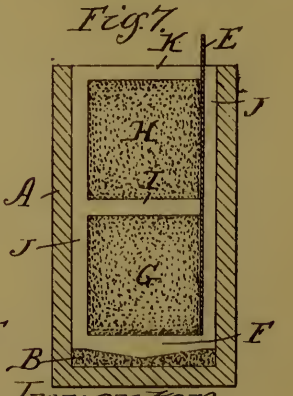


Fig. 7.



Witnesses.

Wm. M. Rheem.

Wm. A. Fleming

Inventor

Chas. W. Stevens

by Raymond & Cruikshank Attys

(Application filed Nov. 12, 1897.)

(No Model.) 2 Sheets—Sheet 2.

Fig. 8

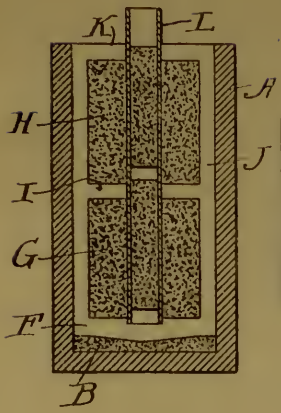


Fig. 9

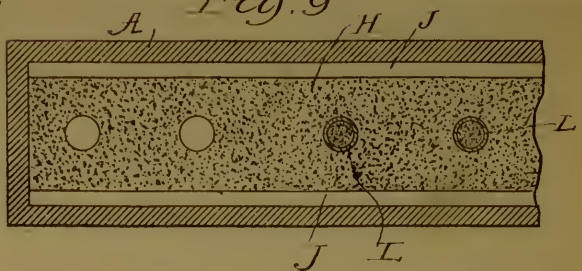


Fig. 10

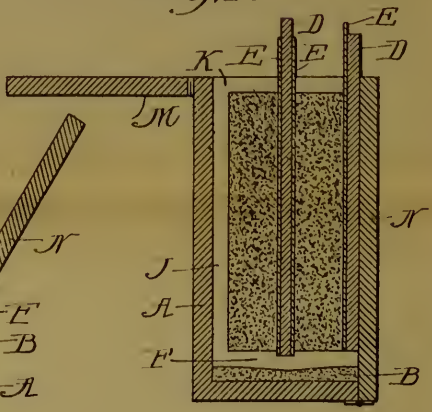
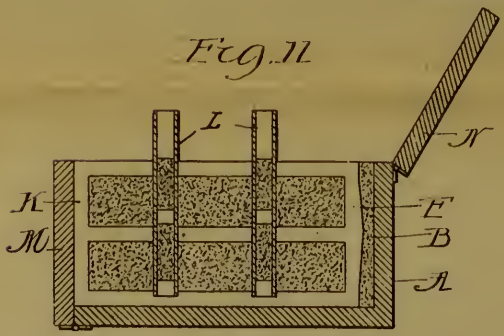


Fig. 11



Witnesses
E. G. Baniels
Wm. M. Rheem

Inventor
Chas. H. Stevens
by Raymond & Quackenbush
Attys.

UNITED STATES PATENT OFFICE.

CHARLES W. STEVENS, OF HARVEY, ILLINOIS.

PROCESS OF MAKING ARTIFICIAL STONE.

SPECIFICATION forming part of Letters Patent No. 624,563, dated May 9, 1899.

Application filed November 12, 1897. Serial No. 658,273. (No specimens.)

To all whom it may concern:

Be it known that I, CHARLES W. STEVENS, a citizen of the United States, residing at North Harvey, in the county of Cook and State of Illinois, have invented certain new and useful Improvements in Processes of Making Artificial Stone, of which the following is a full, clear, and exact description, reference being had to the accompanying drawings, forming a part of this specification.

This invention relates to improvements in the processes for the manufacture of artificial stone, and particularly to that class exemplified by Letters Patent of the United States No. 583,515, granted to me June 1, 1897.

The object of the present invention, generally stated, is the same as the object of the invention disclosed in the said Letters Patent—to wit, the production of either plain or ornamental artificial stone in the place where it is to be permanently used or in a factory from whence it is distributed for use.

The object of the present invention, more specifically stated, is an improvement in the processes for manufacturing artificial stone, whereby either solid or hollow, plain or ornamented artificial stone may be produced, adaptable for any building purposes, such as cornices, courses, fronts, or any other purpose to which natural stone is generally applied in building, and at the minimum cost, both of material and workmanship, and of such simplicity as to dispense with the employment of skilled labor.

The process described in my former patent above mentioned is what I have designated as the "dry" process, the stone-producing compound being therein molded and manipulated in a dry powdered form in the molding operation and subsequently saturated with water. In my present invention, which I have designated as the "wet" process, the stone-producing compound is molded and manipulated in a wet or plastic state, and the final step of saturation of both the compound and the molding-sand is dispensed with, the molding-sand in my present invention being comparatively dry and relied upon to extract or absorb the moisture from the stone compound.

In carrying out my process any suitable form of apparatus may be employed; but I have found by practice that the apparatus illustrated in the accompanying drawings possesses many advantages over any other apparatus known to me.

I will therefore describe and illustrate my said novel apparatus in connection with my process as the preferred form of apparatus for carrying out the same, without, however, desiring to in any manner limit my invention to the use of such an apparatus.

In the drawings, Figure 1 represents a perspective view of a typical completed hollow stone as produced by my process. Figs. 2 to 7, inclusive, illustrate one way of using my preferred form of apparatus in carrying out my process, as will be described in detail farther on. Figs. 8 to 11, inclusive, represent detail views illustrating a further use of my invention for producing a superior article of manufacture by my process, as will be described in detail farther on.

While my process is adaptable to the manufacture of any kind, form, or configuration of stone, it is particularly applicable to what is called "hollow stone," resembling in shape the ordinary terra-cotta hollow building-tiles with strengthening cross-webs, for cornice-work, ornamental coursework, entire fronts, and the like, and I will therefore describe my process in detail as employed in the manufacture of such hollow stone, it being understood, of course, that the apparatus, even of my preferred form, must be varied as to dimensions, configuration, and use, according to the article which it is desired to produce.

Referring now to the drawings, I will first say that we will assume the form of hollow stone illustrated in Fig. 1 is sought to be produced by the apparatus in the manner illustrated in Figs. 2 to 7.

I first take a box A, of suitable dimensions, corresponding to a molder's flask, the inner walls of which I prefer should serve as the faces against which all of the outer plane faces of the stone article shall be molded except the ornamented and opposite faces thereof. In the bottom of this box I place a suitable layer of fine molder's sand of any suitable thickness and in a just sufficiently-moistened condition to hold its form when pressed to any desired shape. In other words, I pro-

pose to have this sand as dry as possible for the intended purpose. Into this sand with a suitable pattern I impress the shape of the ornamented face desired—such, for instance, as the face C of the stone illustrated in Fig. 1—which pattern should preferably extend over the entire area of the interior of the box. I next pour into the impression thus made the stone compound in a plastic or semiliquid state, sufficiently wet to flow easily and to a depth corresponding with the desired thickness of the hollow stone. This compound may consist of any stone-producing mixture of materials and may be either colored throughout or mixed to produce a mottled effect or to produce contrasting colors on the face of the ornamental stone, and, in fact, different colors of the compound may be poured to form different parts of the ornamented face. This first manipulation, as far as described, is illustrated in Fig. 2. I next insert the parting-boards D at the vertical sides of the box, which are faced with metallic facing-plates E of suitable form upon the interior of the box. Both the parting-boards and facing-plates rest upon the back or top of the ornamented stone facing and preferably extend a little beyond the upper edges of the box. I then fill in the box, say, to about one-half its depth (or to any other point, according to the number of strengthening-webs desired) with the molding-sand, as at G, in as nearly dry a state as is practicable, and upon this sand filling pour a suitable layer of the stone compound in a plastic or semiliquid state. Figs. 3 and 4 serve to illustrate the use of the apparatus as thus far described. I next fill in with more molding-sand, practically dry, nearly to the top of the box, as illustrated at H in Fig. 5. Having now formed in the sand the ornamented front wall F and the strengthening-web at the center of the hollow stone, I next successively draw out the parting-boards D and pour into the spaces formed by them the stone compound, which flows down to and unites with the front F and the strengthening web or partition I, thereby forming the sides J of the hollow stone, as illustrated in Fig. 6. I next withdraw the facing-plates E, as illustrated in Fig. 7, and fill in to the top of the box with the stone compound, which unites with the sides J and forms the back wall K of the hollow stone. The hollow stone is now completely molded and may now be laid aside for setting or curing in any well-known or desired manner, according to the compound used.

The use of the parting-boards is desirable, as will be readily seen, in order to have a wall to build against and at the same time which may be withdrawn to allow the stone compound to flow in and take its place. The use of the metallic face-plates, in connection with the parting-boards, is also very desirable, because neither the sand nor the stone compound will adhere thereto, as they would to the parting-boards, and hence when withdrawn they leave comparatively sharp and square edges as between the stone material and the molding-sand, thus producing an article of superior finish. I may also say that if found desirable the top layer of stone compound, forming the back K of the hollow stone, may be covered with a sufficient layer of sand to properly aid in the absorption of the moisture from this part of the compound and at the same time protect the same against the direct action of the atmosphere thereon, which might in some cases produce weather-checking.

It will of course be understood that I have herein illustrated and described the simplest form of apparatus and a type of the simplest form of hollow stone which can be produced by my process, and it will of course be understood that in the making of artificial stone of different shapes, contours, and dimensions the box, the parting-boards, and the facing-plates must be modified accordingly, for obviously hollow stone with both ornamented sides and ends or with obliquely or otherwise disposed ornamentation and contour extending in various directions may be produced by my process and apparatus without any variation whatever in the process and practically no variation in the apparatus, excepting that the use of the parting-boards and facing-plates would probably in all cases be limited to the plane surfaces, although that is not absolutely essential, because the blocks may be molded with either top, bottom, sides, or ends uppermost or in an oblique position, according to the particular article being made. I have also found by practical experience that in the molding of either delicate or intricate ornamental designs the best results can be obtained by first filling in the impression of the pattern made in the sand to the depth of about an eighth of an inch with dry stone compound and backing it up with the liquid compound, because the fine lines and sharp edges will be better brought out, the dry powdered stone compound entering the depressions formed by the pattern more perfectly than the plastic or semiliquid compound. I have also found that where it is desirable greater strength may be given the hollow stone, either laterally or longitudinally, than is afforded by the strengthening web or partition formed therein in the molding of the stone by providing posts extending between the exterior walls, either front and back or sides, and also, if desired, between the partitions and the external walls. These posts are formed of the stone compound in the manner about to be described, it being understood that in both cases the posts are formed before the hollow stone is allowed to set or is cured. In other words, I am able to produce by this process an article superior in strength to that produced by any other process and by the use of the same apparatus employed in carrying out the process.

In producing a hollow stone thus strengthened of the form illustrated in Figs. 1 to 8 of the drawings I would take a tube L, preferably metallic, and after the stone is completed, as illustrated in Fig. 7, I would force the tube through both the back wall K and partition I, partly through the front F, and of course through the sand fillings or layers G and H and then withdraw the tube, carrying with it the sand and stone compound by which it will be filled. As many of these holes as desirable may be formed along the length of the stone and then filled with the plastic or semiliquid compound up to a level with the surface of the back wall K. Each post will form a homogeneous union with the back and front walls and the partition, besides extending therebetween, so that when the filling-sand is removed from the stone these posts will serve as braces between the front and rear wall and the partition or strengthening-web. In Fig. 8 I have illustrated a vertical section of the molding-box with the stone complete, showing the manner of using the tube L to form the posts. In Fig. 9 I have illustrated a horizontal section of the same, but showing some posts completed and others with the tubes in place preparatory to making the holes for the posts.

In Figs. 10 and 11 I have shown how a hollow stone formed with its ornamented face down and having a strengthening-web at right angles to the back wall K thereof may be provided with posts extending through such partition or web and between the upper and lower walls or sides of the block parallel with the back wall. In such case I prefer to employ a hinged top M and a hinged side N for the mold-box in order that the posts may be formed through the sides of the hollow stone after the same has been formed face downward or in a position at right angles to that in which the posts are formed. In this apparatus it will be noticed that the parting-board D has a facing-plate E on each side thereof to form the strengthening-web, and it will of course be understood that the same means can be adopted for forming the side walls J, in which case of course the side parting-boards D would be set a suitable distance away from the sides of the box or flask, and a layer of sand would intervene between said boards with their double facings and the sides of the box. The stone will thus be formed by molding the stone compound wholly in sand—that is, with sand on all sides or upon each side of each layer of the compound.

I may here state that while the hollow building-stone may be the more common form in which such stones are produced it is within the purview of my invention to produce solid stone blocks or to produce solid flat or concave tiles for use in ornamental coursework, in which case the apparatus would necessarily consist only of a box of the desired shape and dimensions, for after the impression is made in the sand in the bottom of the box the compound will be poured in to a suitable depth and then backed up by a sufficient layer of sand to properly absorb the moisture.

Having thus fully described my invention, what I claim, and desire to secure by Letters Patent, is—

1. The process of forming artificial stone consisting in molding the stone compound while in a plastic or semiliquid state in or on a mold formed of relatively dry sand and then allow the mass to set until the sand absorbs the surplus moisture from the compound, thereby converting the latter to a solid or non-liquid form, substantially as and for the purpose set forth.

2. The process of forming artificial stone consisting in molding stone compound while in a plastic or semiliquid state, in or on a partial mold formed of relatively dry sand, and then covering the compound with relatively dry sand and finally allowing the mass to set until the sand absorbs the surplus moisture from the compound, thereby converting the latter to a solid or non-liquid form, substantially as and for the purpose set forth.

3. The process of forming artificial stone consisting in molding layers of stone compound while in a plastic or semiliquid state between or on layers of relatively dry sand and then allow the mass to set until the sand absorbs the surplus moisture from the compound, thereby converting the latter to a solid or non-liquid form, substantially as and for the purpose set forth.

4. The process of forming artificial stone consisting in first molding layers of stone compound while in a plastic or semiliquid state between or on layers of relatively dry sand, then removing a portion of such layers of compound and sand and replacing such removed portions with stone compound in a plastic or semiliquid state and finally allowing the mass to set until the sand absorbs the surplus moisture from the compound, thereby converting the latter to a solid or non-liquid form, substantially as and for the purpose set forth.

5. The process of forming artificial stone consisting in first forming in relatively dry sand a partial mold of one or more faces of such stone, next filling into the partial mold thus formed a lining or layer of stone compound in a dry powdered state, then molding thereon a layer of stone compound in a plastic or semiliquid state next covering the compound with relatively dry sand and finally allowing the mass to set until the sand absorbs the surplus moisture from the compound, thereby converting the latter to a solid or non-liquid form, substantially as and for the purpose set forth.

CHARLES W. STEVENS.

Witnesses:
WM. O. BELT,
C. L. WOOD.

No. 703,644. Patented July 1, 1902.

E. DAVIES.

METHOD OF MAKING CEMENT FENCE POSTS.

(Application filed May 29, 1901.)

(No Model.)

Fig. 1.

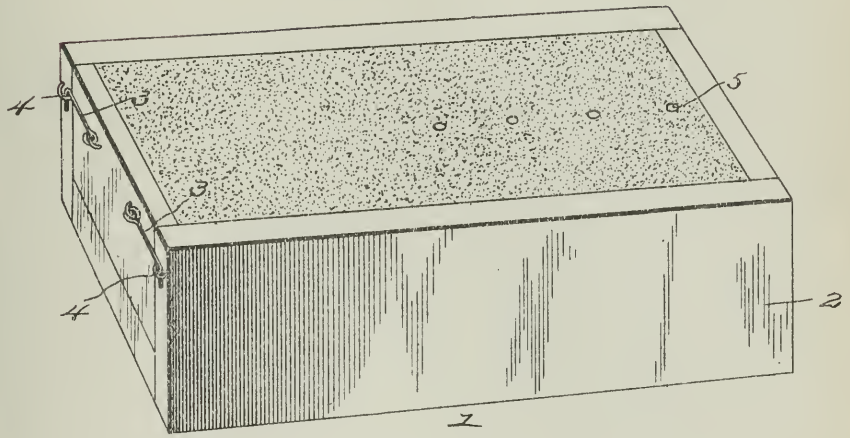
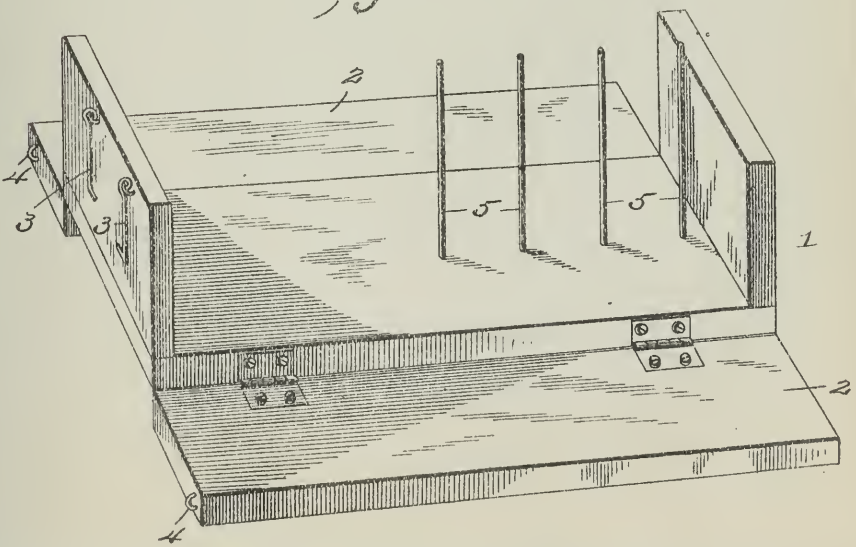


Fig. 2.



E. Davies, Inventor.

By E. G. Siggers.

Witnesses:

Atty.

UNITED STATES PATENT OFFICE.

EDWARD DAVIES, OF READING, MICHIGAN.

METHOD OF MAKING CEMENT FENCE-POSTS.

SPECIFICATION forming part of Letters Patent No. 703,644, dated July 1, 1902.

Application filed May 29, 1901. Serial No. 62,385. (No specimens.)

To all whom it may concern:

Be it known that I, EDWARD DAVIES, a citizen of the United States, residing at Reading, in the county of Hillsdale and State of Michigan, have invented a new and useful Method of Making Cement Fence-Posts, of which the following is a specification.

This invention relates to a method of making cement fence-posts.

The object of the invention is in a certain, ready, and thoroughly practical manner and without adding to the expense of the production of the post to preclude entrance of moisture to the post, whereby hardening will be accelerated and destruction due to disintegration from entrance of moisture will be effectively obviated.

A method heretofore commonly practiced for shielding the post from the action of moisture has been to dust the post while in the mold with cement, and this, by absorbing moisture from the post, will become associated therewith and form a film merely on one side thereof, or at most on a side, the edges, and two ends, thus leaving the remaining side unprotected. While a fence-post treated in this manner will be effective for use in climates where there is but little moisture and but little frost, yet in higher latitudes it would be practically inoperative for effective use, for the reason that if moisture enters or is taken up by the post and this moisture becomes congealed by cold, disintegration of the post is inevitable.

Under the procedure set forth in my invention I provide a protecting envelop or film that entirely covers every particle of the exposed surface of the post, so that in the event of its being set up before the interior is thoroughly dry it will still be protected against entrance of moisture, thereby permitting it in time to set and become perfectly hard and firm.

As demonstrating one way of carrying my invention into effect, I have exhibited in the accompanying drawings a form of mold that may be employed in carrying the invention into effect, it being understood that the invention is not to be restricted to any particular shape of post or any particular shape of mold, as it is equally well adapted to posts of any contour that may be desired, and in the drawings—

Figure 1 is a view in perspective exhibiting the mold with the sides folded up, displaying the post in position therein. Fig. 2 is a similar view with the sides turned down to permit the removal of the posts.

In carrying my invention into effect I fill the mold 1, which may be, as before stated, of any preferred shape, with a mass of damp sand, gravel, and cement mixed in suitable proportions to produce the best results, and this composition is pounded into the mold to cause a close adherence of the molecules of the composition, the sides 2 of the mold being closed up, as shown in Fig. 1, and held in this position by hooks 3 engaging staples 4 on the sides. To present the proper openings or holes through which the wires are passed for securing the fence-wires in position against the post, I associate with the mold a plurality of bars of metal 5, these to be of the required diameter to present the openings desired. When the composition has become sufficiently set to permit of the post being handled without danger of breaking and before it has become finally set, the sides of the mold are let down and the post is removed from the mold and dipped into a bath of pure liquid Portland cement of such fluidity as that it will run smoothly and evenly over the entire exposed surfaces of the post and fill all cracks, crevices, and interstices, except the openings left by the bars 5, the walls of which openings are likewise coated with a film of the cement. By reason of the fact that the cement is in liquid form it will rapidly dry and thereby present upon all of the exposed surfaces of the post an envelop or film of moisture-proof material. Should it be found that one dipping of the post is not sufficient, although it generally will be, it may be dipped one or more times, the point being in either event to effect a perfect closure of any opening that may exist upon the exposed surfaces of the post. The post is then set aside until the coating shall have become thoroughly dried, and the posts may then be set in place for use. When so set up, it will be immaterial to what moisture it is exposed, as such moisture cannot gain entrance to the interior of

the post, and in time the post will become thoroughly set and, as will be readily understood, increase in hardness with age.

Heretofore fence-posts have been given a surface coating by applying the surfacing material by means of a brush or otherwise smearing said material upon the post. This is a laborious operation, requiring considerable time and resulting in an unequal and unsatisfactory surfacing of the post. In view of this disadvantage it is the essential object of my invention to secure a uniform protective surfacing in an expeditious and thoroughly practical manner by dipping the post in a bath of liquid cement, which operation may be quickly carried out and results in a uniform coating without requiring the employment of skilled labor and also without particular attention upon the part of the operator.

It will be seen from the foregoing description that the method herein described will not add any material expense to the production of the post, and by reason of the fact that the life of the post will be indefinitely increased its use will be highly beneficial in the manufacture of posts of this character, rendering them, in effect, indestructible.

From the foregoing it is thought that the construction, operation, and many advantages of the herein-described invention will be apparent to those skilled in the art without further description, and it will be understood that various changes in the size, shape, proportion, and minor details of construction may be resorted to without departing from the spirit or sacrificing any of the advantages of the invention.

What I claim is—

The herein-described method of making fence-posts, consisting in placing plastic material in a mold, permitting the same to remain therein until it has become hard enough to handle without breaking, then removing the molded material from the mold before it has become entirely set, and finally dipping the article one or more times in a bath of liquid hydraulic cement.

In testimony that I claim the foregoing as my own I have hereto affixed my signature in the presence of two witnesses.

EDWARD DAVIES.

Witnesses:
A. L. KINNEY,
F. R. ROBSON.

No. 751,089. PATENTED FEB. 2, 1904.

F. A. MALETTE.

METHOD OF MAKING CONCRETE BUILDING BLOCKS.

APPLICATION FILED APR. 17, 1903.

NO MODEL. 3 SHEETS—SHEET 1.

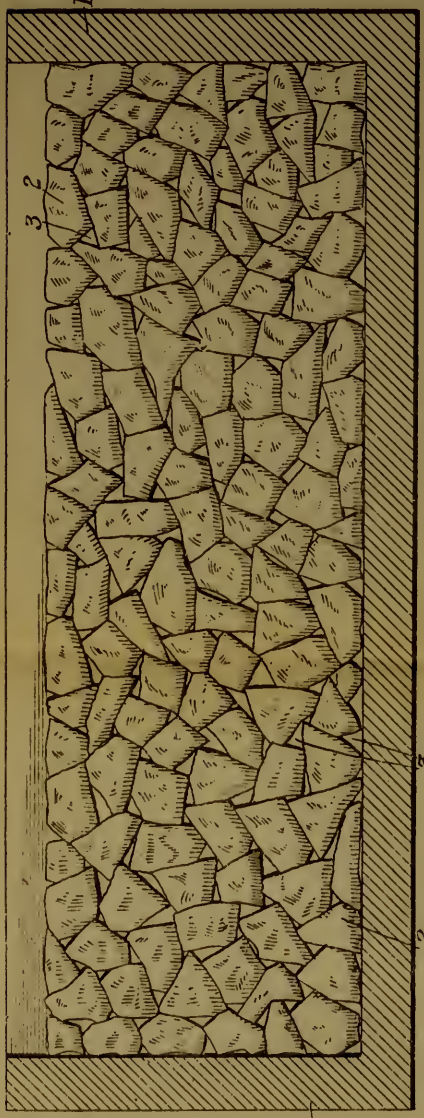


Fig. 1.

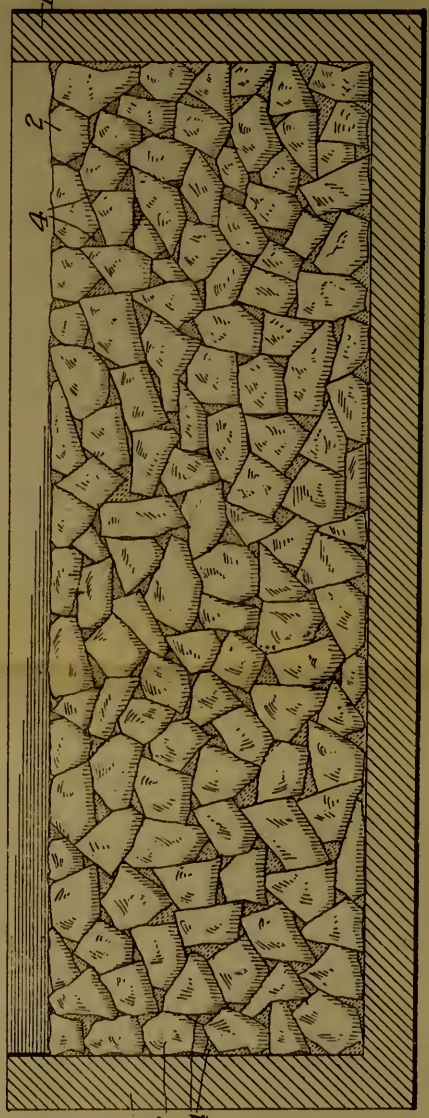


Fig. 2.

Witnesses:
C. B. Harbarger
H. L. Snyder

Inventor:
Frederick A. Malette.
by Thos. Stockbridge
Atty.

No. 751,089. PATENTED FEB. 2, 1904.

F. A. MALETTE.

METHOD OF MAKING CONCRETE BUILDING BLOCKS.

APPLICATION FILED APR. 17, 1903.

NO MODEL. 3 SHEETS—SHEET 2.

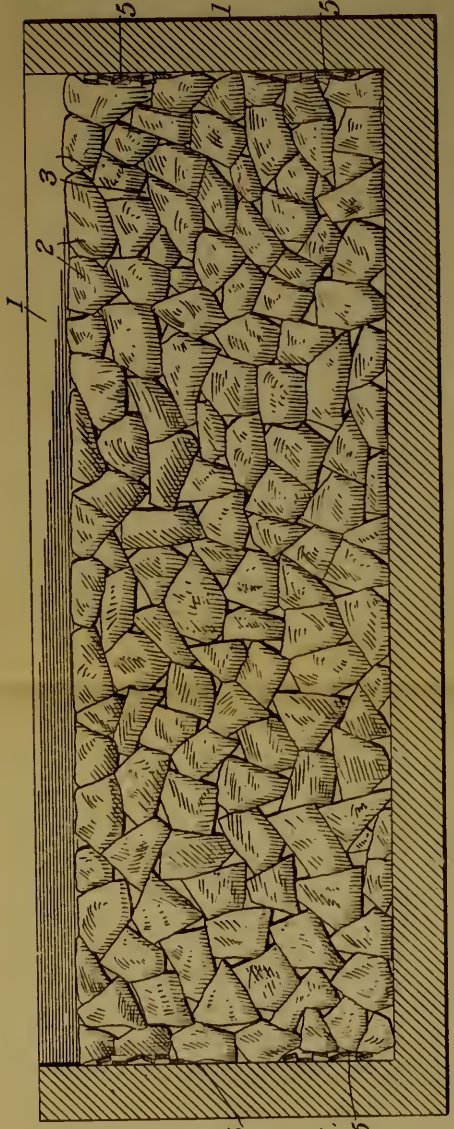


Fig. 3.

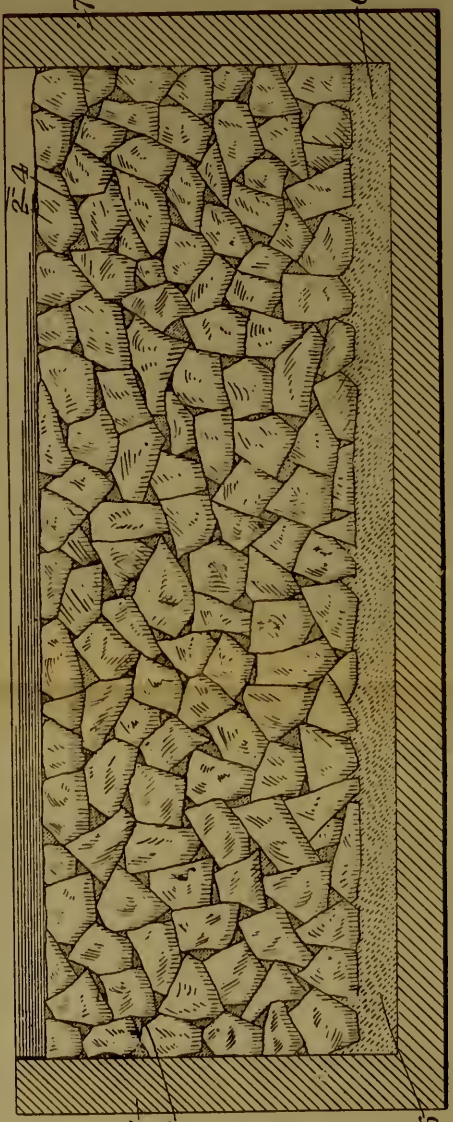


Fig. 4.

Witnesses:
C. G. Harbarger
H. L. Snyder

Inventor:
Frederick A. Malette.
by Wm. Stockbridge
Atty.

No. 751,089. PATENTED FEB. 2, 1904.

F. A. MALETTE.

METHOD OF MAKING CONCRETE BUILDING BLOCKS.

APPLICATION FILED APR. 17, 1903.

NO MODEL. 3 SHEETS—SHEET 3.

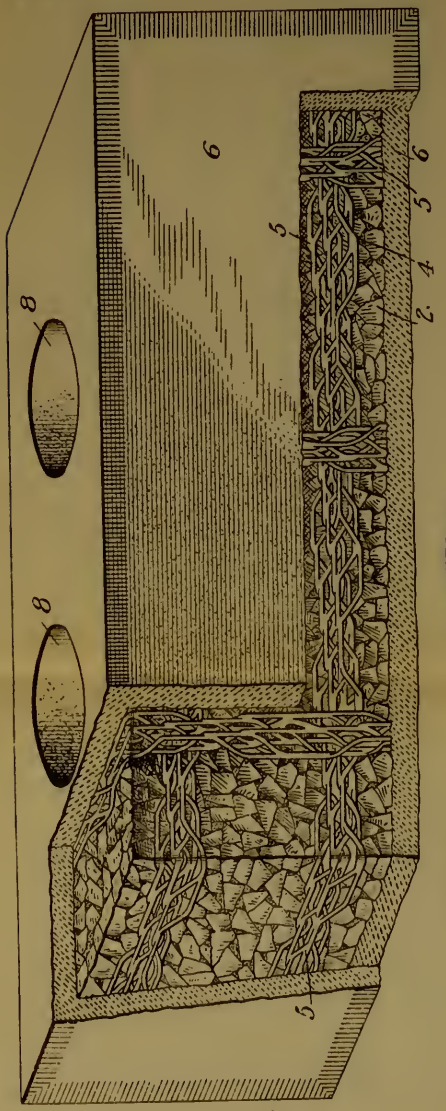


Fig. 5.

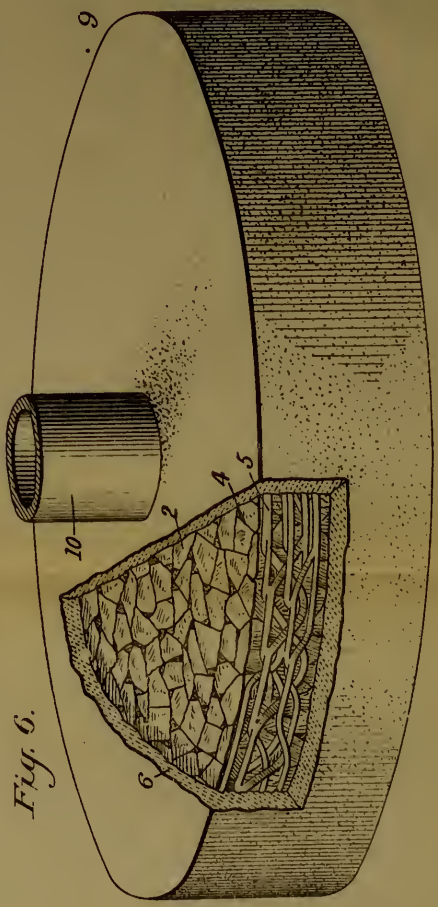


Fig. 6.

Witnesses:
C. F. Harbinger
A. L. Snyder

Inventor:
Frederick A. Malette
by Stanley Stockbridge
Atty.

UNITED STATES PATENT OFFICE.

FREDERICK A. MALETTE, OF GENEVA, NEW YORK.

METHOD OF MAKING CONCRETE BUILDING-BLOCKS.

SPECIFICATION forming part of Letters Patent No. 751,089, dated February 2, 1904.

Application filed April 17, 1903. Serial No. 153,040. (No model.)

To all whom it may concern:

Be it known that I, FREDERICK A. MALETTE, a citizen of the United States, residing at Geneva, New York, have invented a new and useful Method of Making Concrete Building-Blocks, of which the following is a specification.

My invention is designed for the production of an improved concrete building-block or the like having all the features of merit of the ordinary artificial building block or stone, with the advantage thereover of greater strength, rigidity, and strain-resisting power and the further advantage that it may be more easily and cheaply constructed.

The invention consists in the method of making the bulding-block.

In carrying out the invention crushed or broken stone is covered with a coating of mortar, preferably composed of sand and hydraulic cement or of sand, hydraulic cement, and stone dust or screenings. This coating is applied to the surfaces of all the individual stones. Afterward the crushed stone thus coated is placed in a mold, and by compression, either by pounding or otherwise, the stones are bonded together, the bonding being effected by the compression to which the stones are subjected independent of the action of the cement. By thus bonding the stones together the spaces or voids between them are not filled. After the bonding a suitable mortar of thin consistency—composed, for example, of hydraulic cement and sand or stone dust, or both—is poured upon the bonded mass of stone and allowed to flow down and fill a considerable portion of the spaces between the stones. The voids are thus filled after the bonding of the stone instead of at the same time, as is done according to the usual method of mixing concrete when the aggregate and mastic are combined in the same operation. The bonding of the large stones themselves in the first operation makes the completed work much stronger than when dependence is placed entirely upon the cement and mortar. This is due to the fact that the original or natural strength of the individual stones is utilized, that the same are enabled to lie in close contact with each other at their adjacent points, and that they are maintained in such condition by the pressure to which they are subjected. Where a large block is to be made, the filling of the voids with thin mortar must be effected during the operation of building up the block, for the reason that with a very thick or high block the thin mortar will not flow from the top to the bottom, so as to fill the voids or spaces between the stones. In making a large block I proceed in the same manner as above described, except that a larger mold is employed, which is first only partially filled with the broken stone coated with mortar. The mass of stone is subjected to compression, as before, by pounding or in any other suitable way, and the voids or spaces between the stones are afterward filled by pouring thereon a mortar of thin consistency, preferably composed of hydraulic cement and sand or stone dust or screenings. When this has been completed, more of the broken stone coated with mortar is placed in the same mold on top of the mass previously treated and subjected to compression, as before. Afterward the voids or spaces between the stones of the upper mass are filled in the same manner as above described. These steps are repeated until a block of the proper thickness has been completed. For securing additional strength or reinforcement, as in the case of a large block or pillar, expanded metal or its equivalent may be embedded in the block during the course of its construction. This is done by introducing the expanded metal into the mold before the mass of mortar-coated stones is placed therein and proceeding in the manner above described in the construction of the block. When the mortar with which the stones are originally coated and that with which the voids or spaces between the stones are filled has become set, the expanded metal will be interlocked and interwoven with the mass of stone along the outer surface thereof and will serve to impart greater stiffness and rigidity thereto. The use of the expanded metal in the construction of the building-block has the further advantage of providing projections to which a surface coating of mortar may secure itself when the same is applied in the completion of the block. The expanded metal may of course be applied in other ways

than as described. For example, it may be connected with the body of the block after the latter has been completed. Furthermore, wire-cloth or other suitable material may be employed as a substitute for the expanded metal.

When the building-block constructed according to my improved method is to be used in exposed places, a surface coating will be applied to those faces thereof which are outermost and are exposed to view. This surface coating is made of mortar composed, for example, of hydraulic cement and sand or stone dust or screenings, the same being applied while in a plastic condition to the surface or surfaces of the block which are to receive the same and carefully rubbed down and smoothed out, so as to give the same a finished appearance and to render the surface of the block waterproof. It is best to apply this coating to the surface or surfaces of the block by the application of pressure in order to cause the mortar of which the surface coating is made to penetrate the spaces between the stones of which the body of the block is made at the surface thereof. In the actual construction of the block it is intended to apply the surface coating to the body, which is composed of the broken stones bonded together, either before the voids between the stones at the surface of the block have been filled with the thin mortar which is intended to fill the same or before said thin mortar has become hardened or set. A tight gripping action between the surface coating and the body of the block may thus be obtained.

The block may be made hollow, if desired, the only thing necessary to effect this result being to introduce one or more wooden or other cores into the mold prior to the introduction and compression of the mortar-coated stones therein, building up the block around said core or cores and afterward removing the same.

In the construction of pillars it is my purpose to make the same in sections, which are preferably tapering in form and are circular, elliptical, or other suitable shape in cross-section. Each of said sections will preferably be formed with a circular or other suitable opening therein at its center, so that in building up a pillar from the different sections the latter may be strung upon a metal tube or upright which extends through the openings therein.

In order that my invention may be the more readily understood, I have illustrated my improved block in the accompanying drawings in various stages of its completion.

Figure 1 is a sectional view of one of the molds employed, showing a block in its first stage—that is, after the mortar-covered stones have been introduced into the mold and bonded together by compression, but before the voids or spaces between the stones have been filled. Fig. 2 is a similar view showing a block in its mold after the voids or spaces between the stones have been filled. Fig. 3 is similar view showing a block built up in its mold with the expanded-metal reinforce. Fig. 4 is a similar view showing one means of applying a surface coating to the body of the block by the application of pressure. Fig. 5 is a perspective view, partly broken away, of a completed block having openings formed therein and provided with an expanded-metal reinforce; and Fig. 6 is a similar view of one of the block-sections employed in the building up or construction of a pillar, showing a metallic upright extending through the opening at the center thereof.

Like reference-numerals indicate like parts in the different views.

The mold 1 may of course be of any suitable shape, the particular shape being determined by the form which it is intended the completed block shall assume. Into this mold, as shown in Fig. 1 of the drawings, is placed a mass of mortar-coated stones 2, which while in the mold are subjected to compression without filling the voids, the said voids being indicated in Fig. 1 of the drawings by the numeral 3. In the same mold after the bonding by compression the mass of stones has poured thereon a layer of motor of thin consistency, which flows down through the spaces between the stones and fills or partially fills said spaces, as indicated at 4 in Fig. 2 of the drawings. When the block is to be supplied with a reinforce 5 of expanded metal, wire-cloth, or the like, the latter is introducee into the mold, as shown in Fig. 3 of the drawings, and the mortar-covered stones 2 compressed and bonded within it. The metallic reinforce may, however, be otherwise applied to the body of the block, if desired.

One means of applying the surface coating 6 to the block is illustrated in Fig. 4 of the drawings. The mass of mortar which is intended to form the surface coating of the block is placed in the bottom of a mold 7 while in a plastic condition, and a block consisting of the bonded mass of crushed or broken stones is placed down upon the mass which is to form the coating and pressure applied from above. The mortar of the coating is thus caused to penetrate the spaces or voids between the stones at the surface and when it hardens adheres closely thereto by being locked in place. As heretofore stated, it is preferred to apply the the surface coating 6 before the voids between the crushed stones along the surface to be covered have been filled or before the mortar filling said voids has become hardened. If the surface coating is to be applied to more than one face of the block, the mortar which is to constitute the same is introduced either at the side or top of the mold or at both places.

The openings 8 in the block may be produced by introducing cores into the mold 1,

building up the block around said cores, and afterward removing the same.

The block-section 9 (shown in Fig. 6 of the drawings) is one which is intended to be used in the construction of a pillar. The same is made in a similar manner to the other forms of blocks described, but has been shown as circular in cross-section and as tapering from its base upwardly. Each section 9 is formed with an opening extending vertically therethrough to enable the different sections which go to make up a complete pillar to be strung upon a metallic tube or upright 10.

While I have described my invention as a method of making building-blocks, it is intended, of course, to cover a method of making posts, pillars, or other building stone or foundation.

Having now described my invention, what I claim as new, and desire to secure by Letters Patent, is—

1. The method of making concrete building-blocks and the like, which consists in coating the individual stones with mortar, subjecting a mass of the stones thus coated to compression and simultaneously molding said mass into proper shape, whereby the stones are bonded together independent of the action of the mortar and without filling the spaces or voids between them, beneath the surface of the mass, and afterward pouring a thin mortar onto the mass and allowing it to flow down into the voids between the stones and partially fill the same.

2. The method of making concrete building-blocks and the like, which consists in coating the individual stones with mortar, subjecting a mass of the stones thus coated to compression and simultaneously molding said mass into proper shape, whereby the stones are bonded together independent of the action of the mortar and without filling the spaces or voids between them, beneath the surface of the mass, afterward pouring a thin mortar onto the mass and allowing it to flow down into the voids between the stones and partially fill the same and finally applying a surface coating to one or more faces of the block thus formed.

3. The method of making concrete building-blocks and the like, which consists in coating the individual stones with mortar, subjecting a mass of the stones thus coated to compression and simultaneously molding said mass into proper shape, whereby the stones are bonded together independent of the action of the mortar and without filling the spaces or voids between them, beneath the surface of the mass, afterward pouring a thin mortar onto the mass and allowing it to flow down into the voids between the stones and partially fill the same, and finally applying a surface coating of fine mortar to one or more faces of the block, before the spaces or voids between the stones at the surface have been filled.

4. The method of making concrete building-blocks and the like, which consists in coating the individual stones with mortar, subjecting a mass of the stones thus coated to compression and simultaneously molding said mass into proper shape, whereby the stones are bonded together independent of the action of the mortar and without filling the spaces or voids between them, beneath the surface of the mass, afterward pouring a thin mortar onto the mass and allowing it to flow down into the voids between the stones and partially fill the same, and finally applying, with pressure, a surface coating of fine mortar to one or more faces of the block, before the thin mortar introduced into the voids has set.

5. The method of making concrete building-blocks and the like, which consists in coating the individual stones with mortar, subjecting a mass of the stones thus coated to compression, and simultaneously molding said mass into proper shape, whereby the stones are bonded together independent of the action of the mortar and without filling the spaces or voids between the stones beneath the surface of the mass, pouring a thin mortar onto the mass and allowing it to flow down into the voids between the stones and partially fill the same, subjecting another mass of the stones thus coated to compression above the mass originally treated and simultaneously molding the latter mass into proper shape, pouring a thin mortar onto the latter mass and allowing it to flow down into the voids between the stones and partially fill the same, and continuing these steps until a block of the proper size is made.

6. The method of making concrete building-blocks and the like, which consists in coating the individual stones with mortar, subjecting a mass of the stones thus coated to compression, and simultaneously molding said mass into proper shape within a band of expanded metal or the like with which the mass of stones is surrounded, whereby said stones are bonded together independent of the action of the mortar and without filling the spaces or voids between them beneath the surface of the mass, and afterward pouring a thin mortar onto the mass and allowing it to flow down into the voids between the stones and partially fill the same.

In testimony whereof I have hereunto set my hand in presence of two subscribing witnesses.

FREDERICK A. MALETTE.

Witnesses:
J. G. FARWELL,
I. V. TRAINOR.

PROCESS OF MOLDING ARTIFICIAL STONE BUILDING BLOCKS.

APPLICATION FILED OCT. 12, 1907.

,194.

Patented May 17, 1910.

FIG. 1.

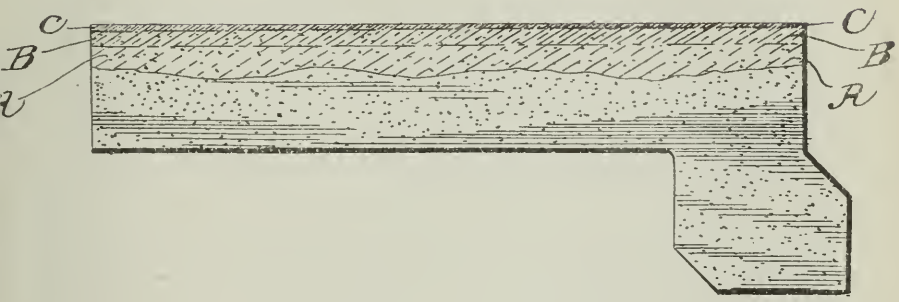
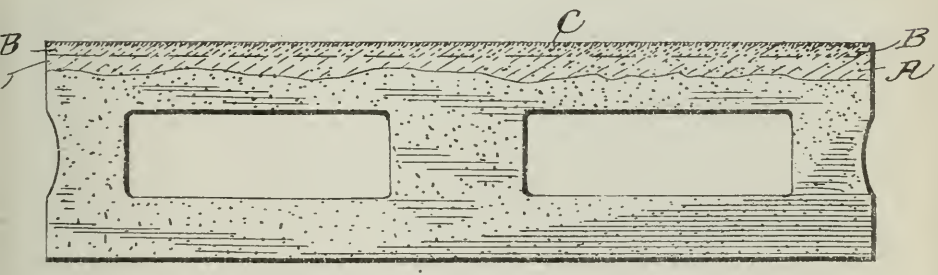


FIG. 2.



WITNESSES

Chas. K. Davies.

INVENTOR

Augustus O. Thomas.

UNITED STATES PATENT OFFICE.

AUGUSTUS O. THOMAS, OF KEARNEY, NEBRASKA.

PROCESS OF MOLDING ARTIFICIAL-STONE BUILDING-BLOCKS.

958,194. Specification of Letters Patent. **Patented May 17, 1910.**

Application filed October 12, 1907. Serial No. 397,221.

To all whom it may concern:

Be it known that I, AUGUSTUS O. THOMAS, a citizen of the United States, residing at Kearney, in the county of Buffalo and State of Nebraska, have invented certain new and useful Improvements in Processes of Molding Artificial-Stone Building-Blocks, of which the following is a specification.

My invention relates to a new and improved process of molding artificial stone building blocks and the like, and particularly contemplates the provision of a process whereby the block may be molded and handled at once, and whereby its usefulness and strength will be equal to that of a wet mold block which could not be handled before twenty-five or thirty-six hours.

My invention further and specifically resides in the following process of molding artificial stone building blocks as will be hereinafter particularly described with reference to the accompanying drawings forming a part of this specification, in which—

Figure 1 is a plan view partly in section of a building block constructed according to my process, and Fig. 2 is a similar view of a modified form of building block constructed in accordance with my process.

According to my invention I aim to provide a building block comprising a body A composed of coarse aggregates and a comparatively small percentage of moisture, being thus made in low plasticity which gives the opportunity of handling the product immediately. The face B of this block comprises a mixture of finely divided aggregates formed in a state of high plasticity, that is with moisture sufficient to render the same into a thoroughly plastic mass. Making the body A of the block of low plasticity and the face B of a high plasticity, gives an opportunity of working the material and at the same time bringing out the virtues of the cement and making the block of sufficient moisture in the mixture, to produce perfect crystallization and to produce stone instead of merely cemented sand and gravel. This block is floated with some pressure which closes the pores in the cement to further the opportunity of working the material properly and the surface is preferably sifted over with finely crushed marble or stone C properly mixed with Portland cement to produce a beautifying crystallized effect.

The addition of the powdered marble or other stone mixed with cement serves the immediate purpose of forming a very thin outside layer on the face of high plasticity preventing, by a thickening or stiffening action, the surface tendency to run, due to the oozing of the water to the surface, and thereby enables the block to be handled and used considerably earlier than would be otherwise possible. The powder further serves to prevent the escape of moisture from the face of high plasticity either by drip or evaporation.

When a mixture is made very dry as heretofore in molding blocks, it is hard to get sufficient water to produce perfect crystallization, while the facing of high plasticity provided by my process uses all the water that is necessary for perfect crystallization.

Having thus fully described my invention, I claim:

An improvement in making building blocks, which consists in forming the body portion thereof, of a mixture of coarse aggregates made in low plasticity, in forming a facing for the outer side of said body portion of a mixture of finely divided aggregates in high plasticity for furnishing sufficient moisture for the crystallization of said body portion, and in forming on the surface of said facing a thin layer in low plasticity by sifting on such surface powdered stone and cement to stiffen the surface of the facing and prevent the escape of moisture therefrom, substantially as described.

In testimony whereof I affix my signature in presence of two witnesses.

AUGUSTUS O. THOMAS.

Witnesses:
S. L. GARRETT,
VIRGINIA MERCER.

UNITED STATES PATENT OFFICE.

DAVID F. SHOPE, OF ST. PAUL, MINNESOTA.

METHOD OF WATERPROOFING CEMENT BLOCKS.

985,709. Specification of Letters Patent. Patented Feb. 28, 1911.

No Drawing. Application filed October 9, 1909. Serial No. 521,796.

To all whom it may concern:

Be it known that I, DAVID F. SHOPE, a citizen of the United States, residing at St. Paul, in the county of Ramsey and State of Minnesota, have invented certain new and useful Improvements in Methods of Waterproofing Cement Blocks, of which the following is a specification.

My invention relates to the method of forming cement blocks having a water-proof facing, its object being to water-proof the exposed face of the block without the application of external pressure or the use of special water-proofing compounds, and in such manner that the block can be immediately removed from the mold.

Cement blocks, as distinguished from cast stone, are usually formed by pressing or tamping in a mold a mixture of sand and cement in a damp or semi-dry state so that the blocks can be immediately removed from the mold. The block, when formed and cured, is a porous body with interstices, voids, or pores between the particles of sand and cement, to which mortar will adhere in wall construction, but which must be waterproofed on its exposed face to prevent the absorption of moisture.

Where a special water-proofing compound is used, it is apt to destroy perfect crystallization during the curing period as well as to discolor the block. And where a special water-proofing compound is not used, the surface to be water-proofed must be thoroughly wet in order that the cementitious material used for water-proofing shall enter the pores or the block and become thoroughly crystallized so as to form a perfect union. In the manufacture of what is called "cast stone," the cement and aggregate (sand, marble dust and the like) is mixed to a flowing mass and cast in a mold, from which it cannot be removed until it has hardened and set, that is from three to ten or twelve hours, according to the temperature and set of the cement. It is impracticable to apply this liquid process to cement blocks by placing in the bottom of the mold a sloppy mixture of cementitious material and then forming the cement block upon it, because the block cannot be removed from the mold until the wet mixture has set, and the cementitious material will not enter the pores of the block except under pressure.

In the present method the block is first formed in the usual manner by mixing sand and cement in a slightly moist or semi-dry state, and pressing or tamping it in a mold. Water is next applied, as by sprinkling, to the face of the block in sufficient quantity to enter the pores or interstices of the block, and then a powder of cement, either neat or mixed with sand or other ingredients, is sifted upon the water, which is at the same time agitated so as thoroughly to saturate the face of the block. The water will thus enter the pores or voids of the block to the required depth, and carry with it the cement powder sifted thereon. The water serves both to carry the cement into the pores and to cause crystallization of the added cement, and no external pressure will be required to force the water and cement into the block. The face of the block is then stippled or otherwise treated as may be desired, and the block removed from the machine and cured in the usual manner.

It will be understood that the main portion of the block remains in a comparatively dry state so that it can be immediately removed from the mold, and all its faces, except those exposed to the water and crystallizing mixture, will be porous so that the mortar will adhere to them, while the outer face will be proof against the absorption of water because all of the interstices and pores have been filled with crystallized cement.

The word "block" is here used generically to include a brick, tile or other mass of any shape or size, as well as a "block" technically so called.

I claim as my invention:

1. The herein described method of forming a water-proof faced cement block, which consists in first forming the block of suitable material in a semi-dry state, applying water to the face of the block in a sufficient quantity to enter the pores or interstices thereof, and adding cement to the water, whereby the cement will enter the pores or interstices with the water.

2. The herein described method of forming a water-proof faced cement block which

consists in first forming the block by mixing sand and cement in a semi-dry state and molding it, then applying water to the face of the block, then spreading cement upon the water and agitating the mixture to carry the cement into the interstices of the block to the required depth.

In testimony whereof I affix my signature in presence of two witnesses.

DAVID F. SHOPE.

Witnesses:
EDWIN R. HOLCOMBE,
H. SMITH.

No. 4290

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

ROY WARD and OTTO PETERSON,
Copartners,
Appellants,

vs.

SHOPE BRICK COMPANY, a Corporation,
Appellee.

APPELLEE'S BRIEF

Upon Appeal from the United States District Court for the District of Oregon

ROBERT R. RANKIN,
Attorney for Appellee.

HOUGHTON-CARSON COMPANY, PRINTERS

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No. 4290

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APPELLEE'S BRIEF

Upon Appeal from the United States District Court for the District of Oregon

INTRODUCTION—*The Parties*

The patent process for making a faced cement brick involved in this suit expires in four years.

During its thirteen years of life, the respondent owner has built a substantial plant in Portland, Oregon, and sold licensees the right to operate under its governmental protection over the North American conti-

nent, whereby investments of between four hundred thousand and five hundred thousand dollars are now existent, producing between two hundred thousand and three hundred thousand faced brick per day. The patent rights have been acknowledged and acquiesced in and "no one worth while in a material way has attempted to infringe the patent."

The appellants have operated on the southeast outskirts of Portland, Oregon, in an old barn, from May to October, 1923, with what one of the appellants called "a little machine" purchased either from Montgomery, Ward & Company, or Sears & Roebuck, marked "Pat. Apl.", one mixer and one form mold, as shown in the pictures (Plaintiff's Exhibits are numbered 2, 3, 6 and 7) upon which they had manufactured a total of five thousand faced concrete brick.

QUESTIONS INVOLVED

There are but two questions involved in this case: first, is the patent valid, and in this regard it is noted that the patent is attacked upon three points: that it does not involve patentable invention, the process was anticipated in the prior art, and it is inoperative; and second, did the appellants infringe the patent.

Assignments of Error 1, 2, 3 and 4 involve the first question; Assignment 5 involves the second question; and the remaining Assignments, 6 and 7, are purely general, predicated upon the adverse finding of the

court to appellants' contentions on both of the above questions.

STATEMENT OF FACTS—A. *General*

Appellants' Brief offers practically no statement of facts, so the evidence on all points involved is segregated as follows:

David F. Shope is the original inventor of the process of forming a waterproofed faced cement block, as described in Letters Patent 985709 (213)*. The patent was assigned to the predecessor in interest of the Shope Brick Company and is now owned in its entirety by the appellee. The company operates a manufacturing and selling business at Portland, Oregon, and has extended the monopoly intended by the Patent Office to eliminate duplication of investment and ruinous competition, to licensees in twenty odd states of the Union and Canada, upon which these licensees, exclusive of appellee's business, have founded investments, including machinery, installation, overhead and license protection, to the extent of four hundred or five hundred thousand dollars and produced from two to three million faced brick per day, depending upon the class of faced brick and material used, which industry appellee has covenanted itself to protect by a guarantee issued to each licensee: "That vendor (appellee) is the sole and exclusive owner of said patents and patent rights

*Whenever figures are mentioned, unless otherwise indicated, they refer to the Transcript of Record.

and licenses and that it will warrant and defend * * * the licenses of rights under said patents to vendee in the use of said process in said territory against all persons whomsoever," (Defendant's Exhibit is lettered C) and with these licensees, appellee is in constant touch.

The appellants, Ward and Peterson, have lived in Portland, Oregon, since 1907. Roy Ward followed general cement work, when not engaged as Deputy Sheriff or railroading, and Otto Peterson has been engaged in cement construction work "off and on * * * around fifteen or sixteen years", and adding, "I am not very much of a cement man." They started to get their building ready the first of 1923, purchased their machine the following May, and made their first brick about that time and continued until stopped by injunction of Federal Judge Wolverton, on the 23rd day of October, 1923. Appellant Peterson did not but Ward did make brick. All of Peterson's previous experience when in the brick business up to 1923, was in the manufacture of clay brick.

STATEMENT OF FACTS—

B. *Patentable Invention*

As stated in open court, appellee's business depends on the validity of the one mentioned patent, and all others were stricken from the case, leaving this suit to be contested upon Paragraphs I, II, III, VIII, IX and XIV to XVIII of the complaint and Paragraphs I, II, III, VIII, IX, XIV to XIX, XXII and XXIII of the answer.

Patent 985,709 was introduced in evidence, admitted, marked Plaintiff's Exhibit 1 and read.

Mr. Shope, the inventor, began experimenting twenty years ago because he conceiced the idea, as cement became available, that it was possible to make brick out of cement at points where clay was not available and long distance shipments were either a heavy expense to the clay industry or rendered the use of clay products impossible. The bricks at that time were semi-dry common bricks and chemists had just begun their integral water proofing compound to overcome porous conditions of cement bricks and there was very little cement brick product on the market. Such as existed was porous and weak in comparison to what a good concrete product should be, and the invention overcame this through the incorporating of more water in the fabrication and effecting the process of waterproofing as well as ornamenting the face. The trade did not take kindly to the proposition except in limited cases. The inventor had a great struggle, but gave the effort to place his process before the public, his serious and constant attention for some twenty years, which had been primarily devoted to that service, and the present business of licensees amounts to about for or five hundred thousand dollars and extends over the North American continent. He operated his business without interference until three years ago, always eliminating infringers, who consisted of no one worth while in a material way. Many of them quit without contest when the matter was placed before them or the patent inves-

tigated. At the present time he has one case pending in Pennsylvania and one in the state of Washington, in addition to the present one against Ward and Peterson whom he had not licensed or authorized to manufacture or sell brick and, having become aware of their activity about May or June, 1923, contemplated visiting them and was prevented from doing so by sickness until, in company with his attorney, he visited the plant in July, 1923, and advised appellants they were making faced brick which was an infringement of his patent; to which they replied that they had been doing this for twenty years, to which Mr. Shope replied he would give them $500 or $1,000 to produce such brick; and he was then ordered out of the plant, the interview ending unpleasantly.

Appellee introduced the oral testimony of Angus Fleming and G. E. Starks to show there was no invention disclosed in the patent, the former swearing that he was more or less acquainted with Shope patent and acquainted with the making of cement block in a semi-dry state for some twenty-two years, with the application of water if they wished to put a coating on a block with a trowel as is described here, the putting of face on a brick and the coating or plaster on a wall. He had also put down sidewalks with the same material and in the same manner; that there would be pores or voids in the cement structure as there were even pores in a glass bottle, and the cement mixture of coating would enter these pores to some extent if you used water enough and put the water in first before the cement. In such

instance the cement would go down into the pores of the block to a slight extent but only by using pressure or by being wet, and would go no further down than between the sand particles on the exposed surface of the brick. He had had experience to prove this by facing abutments of rough concrete in the Grand Avenue Bridge, Portland, and nearly forty years ago he remembered doing work with dry cement and sand mixed together in semi-dry state and sprinkled cement over or troweled cement into a block because there was a surplus of water. In answer to the Court's inquiry if he covered the block of semi-dry cement with water and sprinkled cement over it, if cement would go into the block, he replied this would depend on how large the pores of the block were and if it was sand it would penetrate but a very small distance, but he never saw brick made according to the Shope method as described in the patent.

Mr. Starks testified he had been foreman of a concrete crew for several years and had been acquainted with the manufacture of bricks from a mold in a semi-dry state for twenty-two or three years. Thirty years ago in Michigan, he had made caps for pillars for porches, and later in Portland had used lamp black in coloring sidewalks, putting it on dry, applying it when the cement is pretty well hardened, then taking neat cement and plastering it on top, roughing it in to form a bond with the coating that was put on; and, taking a cement block, pouring on cement and water and there would be very little penetration. If the pores in the

cement block in a semi-dry state were large enough, there would be penetration but the moisture will rather come up to the cement than the cement go into the brick unless you work it down with agitation. You can put water on the surface of the block and put your dry cement over your water and your cement will not carry your material down into the pores. So far as penetrating of the brick is concerned, the cement would not penetrate three-eighths of an inch into the brick. He had never made any experiments on brick and based his statements on experience with asphalt pavement. But water would take the cement down into the brick if the voids were large enough, but he did not believe you could get them large enough in sand. He could not give any figures on the fineness of these voids or the fineness of cement particles, as he was not an expert on that. When asked by the Court if he took a semi-dry block in a mold, could he pour water on it and have the water go into the block, he said if the block was moist, the water would go clear through it, but it would not carry the cement in solution very far into the brick; that he did not know anything about cement brick.

Roy Ward testified that he carried mortar when he was nine years old, and had applied the trowel to facing on cement blocks in a plant in Iowa in 1904, and was doing nothing different from that now.

Otto Peterson testified that he had been "just off and on" in the cement construction work for fifteen or sixteen years; that he had seen Ward making these

brick and had seen it done twenty-five years ago at St. Paul, Nebraska. At that time he was not working in "cement brick mills," but ran a manufacturing clay brick yard.

Dr. Ralph K. Strong testified that his experiment on the penetration of the cement into a block had been based upon straight sand covered with water, the cement added without mixing and poured onto the sand and allowed to set. The vessel in which it was contained was broken and the surface contact between sand and cement carefully examined and there was no penetration, and that in some cases free surfaces of cement were exposed. This was true with either dry or neat cement; and that agitation affected the result to the extent that the greater the agitation, the more the block material will be intermingled with the cement, but there would be no difference in penetration, that is, cement passing into voids. That it was perfectly apparent that any void that is less in diameter than the cement particle will hold the cement particle from penetration and, under the colloidal theory, the cement particles would not go in as far as they would when the cement was fresh, but would act as a means of excluding the intrusion of cement into the pores. Dr. Strong admitted on cross-examination that the patent did not mention a brick made solely of sand and that the patent called for a porous body and being made of solid particles, there must be some voids and when the milk of cement was placed upon such porous body, if the voids were larger

in diameter than the particles of cement, the cement particles would "fall in."

Dr. Ernest E. Werner, appellee's expert consulting engineer, testified that the basis of this patent is the method of forming waterproofed faced cement blocks and after the formation of a semi-dry body, which is old in the art, he wishes to place a facing, described as follows:

> A. "He (patentee) says, 'Water is next applied, as by sprinkling, to the face of the block in sufficient quantity to enter the pores or interstices of the block, and then a powder of cement, either neat or mixed with sand or other ingredients, is sifted upon the water.' Claim 1 substantiates this description to this point. He then adds: 'Which is at the same time agitated so as thoroughly to saturate the face of the block.' The 'same time' is rather important. Now that clearly defines to me what he wishes to do. He now goes on to explain what will happen. 'The water will thus enter the pores or voids of the block to the required depth, and carry with it the cement powder sifted thereon.' That is purely an explanation. Then also 'The water serves both to carry the cement into the pores and to cause crystallization of the added cement, and no external pressure will be required to force the water and cement into the block.' That concludes his statement. The rest of the sentence merely expresses that he may thereafter do what he

pleases, which presumably is his right. That, your honor, in my opinion is the substance."

Q. "We have had some testimony as to how cement and water act or interact in regard to colloids. In your opinion does this matter for the purpose of this patent?"

A. "Not everyone accepts the theory of colloids as applied to the cement industry, the utility of cement; this theory is being more and more adopted, although still considerable controversy exists. I would say it enters to this extent; it throws considerable light upon the statement made by the patentee, as to carrying cement into the voids, I would rather think on the earlier steps of the formation of the ultimate colloidal gel. These earlier steps being merely the suspension of the cement in water, similar to what Dr. Strong referred to in his mud puddle. Cement is very much the same substance physically as clay. Furthermore, the standard cement is of varying fineness; I am speaking from memory, although I have little literature to verify it, your Honor. Twenty-five per cent of the ordinary cement will float upon a 200-mesh sieve. I believe there are standard Government specifications and I am rather referring to this than to scientific discussions on the subject. Also 25% of the particles will be finer than two ten-thousandths of an inch. Now that is well within the borderland of suspension, such suspension as the doctor re-

ferred to in regard to mud. It does not take much imagination to visualize that when one takes a quantity of cement and a quantity of water—I think we can even fix the quantity—if one takes a large quantity of water and a small quantity of cement, one could use in part a colloidal suspension which will pass through a filter; I can see no difficulty why it should not enter the superficiary pores. Now, when one approaches this from the standpoint of the patent, this is dealing with indefinite quantities. The patentee says 'sufficient' to enter the interstices or pores. One might reason this—rather let me put it this way; I would reason this way: That part of the cement, that part which enters—may I use his language—'some of the cement' will doubtless be put into this condition of suspension and thereby enter the pores. Dr. Strong spoke very correctly of the latter stages of the setting of cement. Later on, this hypothesis may apply, this imaginary condition of gelation, a plastic colloidal gel be formed, but we cannot reach that condition, if your Honor pleases, without getting preliminary our condition of suspension which functions for the patentee." (Pgs. 173-176.)

Dr. Werner then testified as to the experiments made in his own laboratories, as follows:

"Again, using roughly from memory patentee's description, the semi-dry aggregate was mixed. May I, in reference to this disputed point, agitation

and pressure, state the details? Six brick were made simultaneously. There were six molds in bank. The upper surface of these molds, when in juxtaposition and ready to receive the aggregate formed a perfectly smooth surface over which either trowel or float or any other instrument which is wide enough to straddle it would of course float, in the full sense of the word, would not compress. Into this mold was placed the aggregate which was tamped and stricken off. On it was placed water and cement in the following fashion. The man would hold in one hand a sprinkling-can and in the other hand a can arranged to sprinkle or discharge a regulated quantity of cement and rapidly pass both over the mold. He would then take this instrument which you have in your hand and use it. Now, as to whether or not, under those circumstances, there is much—some compression, one might quibble, but I would say that in view of the fact that the upper surface of the mold clearly restricts the downward motion or movement of the instrument used, one can call it, with perfect propriety, agitation." (P. 186-187.)

And the brick introduced in evidence Exhibit 11-A, 11-B and 11-C, were made in the manner described in the patent with certain variations in finishing, and the result of Dr. Werner's experimentation was as follows:

"If I may put it in my way: It occurred to me last night, after listening to Professor Strong, that

his statement of no penetration was hardly in accord with experiments which I had made at my laboratory at St. Louis in similar fashion, and not knowing whether I had been mistaken at that time, I wanted to repeat it under commercial conditions. The experiment is hardly a fair one in this sense, that instead of using sand, as directed by the patentee, I substituted a ground coke. I am speaking fair in a commercial sense, for I cannot see that this patentee has said to me I cannot put this facing on ground coke if I wish to do it, if I formed a block from it. If your Honor pleases I would like to have this speak for itself. I call it a slight penetration. May I have the exhibit broken now, if you please. I wish to break it in court." (P. 188).

The brick was broken and Mr. Werner stated from his examination, he unquestionably found penetration; that this brick was made in accordance with patent specifications, and the claim of what was old or new, as disclosed in this patent, is clearly set forth in Dr. Werner's testimony that the art was as ancient as the pyramids and many men had endeavored to make blocks out of cement, but he had been unable to find specifically either sequentially or otherwise, the thought of mixing *"in situ"*—it is either that or nothing. Mix *in situ,* that is what this patentee wishes to do.

STATEMENT OF FACTS—C. *Anticipation by Printed Patents*

Twenty patents were cited in the answer and alleged to bear upon the process patent in this case. For brevity's sake, we divide these patents into three classes:

First: Thirteen of those patents so cited as antcipating the Shope process are not contained in the transcript of record. The appellants have apparently abandoned them as without merit and for the same reason, no discussion is given here. Dr. Werner's testimony (178-185) briefly given, disposed of them to appellants' satisfaction.

Second: of the seven patents introduced (253-279), there was no evidence to support them and though they were briefly distinguished as hereinafter disclosed, no cross examination was risked by the appellants to refute the distinction made. These patents are:

(a) Edward Goode, No. 508,239, defendants' Exhibit "F", distinguished as forming a surface of pure cement, and claims that his stone must remain in the mold for a twenty-four hour period prior to removal. This would not lend itself to commercial mass production of brick as is accomplished under Shope patent (p. 179).

(b) Augustus O. Thomas, No. 958,194, Defendants' Exhibit "V", distinguished as follows:

"On lines 55 to 65 this patentee says the following: 'The addition of the powdered marble or other stone mixed with cement serves the immediate purpose'—I have no doubt it will be made clear—'the immediate purpose of forming a very thin outside layer on the face of high plasticity preventing, by a thickening or stiffening action, the surface tendency to run, due to the oozing of the water to the surface.' In his claim, line 86 and on over to the end, he says: 'in forming on the surface of said facing a thin layer in low plasticity by sifting on such surface powdered stone and cement to stiffen the surface of the facing and prevent the escape of moisture therefrom.' Here is a man who clearly had the same intent Shope had. He however makes a three step operation, and consequently if one would operate Thomas, in view of the subsequent disclosure of Shope, one could produce doubtless a brick of Shope type. I don't think however that you could fairly read this patent as having had reference to Shope." (p. 184).

And it is a curious fact that this patent was in the Patent Office at the same time the Shope patent was there, but was issued ahead of Shope, and while appellants seemed to think there is ample room for interference, evidently the Patent Office considered Shope free from such interference.

(c) Frederick A. Mallette, No. 751,089, Defendants' Exhibit "W", distinguished on the ground that

Mallette takes the larger portions of aggregate, covers them individually, in his language, with mortar and puts them in a mold and floats upon it the liquid cement, and bricks could not be made that way.

(d) Charles W. Stevens, No. 625,563, Defendants' Exhibit "J", was distinguished by the Court of Appeals, and opposing counsel did not press the witness beyond that statement.

Third: In distinguishing all the twenty patents cited only the distinction of the following three patents drew the fire of cross examination. All the testimony fairly abstracted is as follows:

(a) Antone Federici, No. 518,239, Defendants' Exhibit "G", was distinguished because it defined a process of putting large pebbles into a liquid mass of cement and allowed to harden the mass in the mold. The cross examination thereon was as follows:

In the Federici patent, Figure 3 of the drawing shows something of a cement block with a plastic coating C upon it. In distinguishing this disclosure from the Shope process I find myself in difficulty in that they don't resemble each other in thought or conception. I may be at fault. Shope is for a patent to produce in a specific fashion a specific result. That is my comprehension of it. What is the claim in this? He says, "Into the surface of which pebbles of substantially uniform size are partially embedded." The illustration

shows he has not in mind any more than a building block. As I have said to you cement faced building blocks or even bricks are old except as made in a specific method. I think you ought to show that this is a method of Shope. In line 29 "A" represents stones and pebbles, "B" the pebbles and "C" a layer of pure cement which in the sense we discussed it is a waterproof layer, and is applied to block "D" upon pebbles "B", both of which may be cement. The patent is for an article of manufacture, not a process in the patent, though it does show a process. (pp. 206-207).

(b) William J. Haddock, No. 531,842, Defendants' Exhibit "H", distinguished in that the principal idea of this patent is to combine the use of an artificial and natural cement. It is for a block. The waterproofing is applied in a single layer, that is a stratum between the base and a layer superimposed upon the stratus, which the patentee speaks of as waterproof. In this case this patent as well as many others shows that the art made many efforts to produce waterproof brick. Fairly interpreted, Dr. Werner distinguished it on cross examination as follows:

I find in the Haddock patent, to put it very plainly, almost everything which Shope wishes to make, but I don't find anywheres a clear and concise and specific statement such as Shope makes, that if you mix on the top of your brick you will get a result. With this statement please proceed, because I merely want to help you see how much there is between us. To my mental limi-

tations I do not find this invention in suit, as a process or method of doing a certain thing, also shown in Haddock. In reciting just what Haddock shows, layer B is intended to be a waterproofing stratum in which he superimposes the facing for the element D. Haddock, in the sentence beginning on line 76 of the specifications says, "I employ the term 'moist' and wish it understood as designating a damp condition rather than a condition approximating a fluid or a wet condition, the mass so treated is thoroughly tamped and compressed, the 'moist' condition of the mass preventing the water from oozing out as would be the case were the mixture oversaturated with water," is just what Shope does, but Shope does more, I can't confine him to that statement. I read Shope as a facing on a block which block is old and I don't care a picayune for it. Shope in his first claim says his process consists in first forming a block of suitable material in a semi-dry state which is anticipated in Haddock and elsewhere. Haddock continues: "I then moisten this coating. The amount of material used in this step is sufficient to form a complete coating or covering and constitutes a stratum impervious to water" would not give a Shope brick under the second step of the Shope patent where he applies water, then cement, first sprinkling with water the block which he has formed because Shope goes on further in giving me instructions as to how much water to use,—sufficient for his purpose, next he sifted cement upon it. That is Shope. The Shope process defined in his claim 1, to my mind is not shown in Haddock as above discussed

because of this distinction: Shope directs you to take a semi-dry aggregate tamping it into a mold. This becomes a matrix for further steps. Now he says sprinkle water on sufficient for his next step, sufficient to enter the interstices of the block whereby his next step will produce a result. Surely I can't read disjointed sections of this patentee whose ambition is similar but whose method is different and stop at any one step. While Haddock, in lines 91 and 92, says after he has made this block he then moistens the coating and to the degree to constitute a stratum impervious to water. But Shope speaks intelligently: You can take this Haddock patent or several other patents—I shall not help you with this—and practice them in the light and sense of the Shope disclosure—may I call it the philosopsy of his action— and you will get the Shope result, but I will not go so far as to say that any of the evidence patents—and there are quite a number of them—state this in any such fashion that I can go on making it without dissecting, without separating, without quibbling, and while patents are addressed to one skilled in the art that does not mean one shall dissect out of something part of it. As I understand, it should be made so that one skilled in the art can read it and practice it but not anyone skilled in the art can take a portion of it and leave another portion of it off and do something. That is not my way. Shope is undertaking to tell the world he has made some improvement in the method of waterproofing cement blocks. And I tell you, as far as my investigation goes, he did. I can see in the light of what

he has told me that you can practice him without subtraction or addition of certain matter from the language of other patents, and I have fairly tried in literature of the art, or in the patents, to find this simple statement in a simple fashion, to find the specific direction, but I have been unable. I cannot admit the statement that if the application of a neat cement coating to porous bricks was new in Shope that it was also shown in Haddock. You are asking to admit in essence that the ham in a ham sandwich is the same as the bread. This man contemplates to make a three-layer structure, sandwiching a waterproof coating in there. I think he did. I grant he made it. I do not agree with your statement that all Mr. Shope undertakes to communicate to the public in exchange for this patent was done by Haddock. In language Haddock may have shown the application of a coat of wet cement to a semi-dry cement block, but to my mind not even a suggestion of the clear language of Shope.

(c) Edward Davies, No. 703,644, Defendants' Exhibit "L". This was differentiated on direct as being a patent for fence posts. The cross examination was as follows:

The specification itself does not show a block made of semi-dry cement subjected to a coating of waterproofing cement mixture. I have dismissed it in my notes as for cement posts hardened in the mold. I mean left in the mold to harden. He fills mold 1, 'which may be of any preferred shape, with a mass of damp

sand, gravel and cement, mixed in suitable proportions' to produce the best results, and this composition is pounded into the mold' to cause a close adherence of the molecules of the composition, the sides 2 of the mold being closed up as shown in figure 1, etc.' 'To present the proper opening or holes through which the wires are passed for securing the fence wires in position, etc.' I think he does all you claim, except no indication in my mind to Shope or method. I said everything else of the Shope brick but his method. The process is not shown here. In referring to the sentence beginning with "When the composition has become sufficiently set to permit of the posts being handled without danger of breaking and before it has become finally set * * *" but he says when it has become sufficiently set. He is waiting for this—"the sides of the mold are let down and the post is removed from the mold and dipped into a bath of pure liquid Portland cement of such fluidity as that it will run smoothly and evenly over the entire exposed surfaces of the post, and fill all cracks, crevices and interstices except the openings left by the bars." We are in perfect accord. This man speaks of interstices and bars, and wishes to dip his brick into a liquid bath of cement.

There is a decided difference between subjecting it by dipping and mixing the cement in situ, and surely you will not ask me as a mechanic, or as an engineer, or as a mere scientist, to tell you there is not; but whether or not there is a difference I couldn't follow this on the face of it as a brickmaker, and make the Shope brick.

By dipping you would get exactly the same result Shope does provided you dip intelligently. What I want to say is this, you get exactly Shope results by dipping. May I again say, although you have resented it, that method would hardly render itself for commercial production in masses of brick. I really feel I must draw the Court's attention to that and we are in perfect accord, that by dipping Davies' brick after it has set, as described here, in a liquid bath cement, the cement would enter the interstices and you would get the Shope result entirely different and in my very humble opinion some foolish steps. Line 4 of Page 2 of Davies' patent describes a laborious operation requiring considerable time and resulting in an unequal and unsatisfactory surfacing of the posts. In view of this disadvantage it is the essential object of my invention to secure a uniform protective surfacing. There is nothing between us. I have said you will not get your coat or a perfect finish. The patent concludes, "by dipping the posts," or, reading it your way, "by dipping the brick in a bath of liquid cement, which operation may be quickly carried out, and results in a uniform coating." I perfectly agree with him and still say he is foolish; and the Davies' patent was applied for in 1901.

STATEMENT OF FACTS—D. *Infringement*

On Mr. Shope's first visit to the Ward and Peterson plant, he observed their stock pile, in which was a quantity of faced brick which it would be hard to distinguish in appellee's plant, and, on the last visit, ap-

pellant Ward showed the operation by which these brick were made.

Mr. Bilyeu, a mechanical engineer, fully qualified, said that he saw the workmen operate in the Shope plant a number of times and described the operation as follows:

> "The aggregate of sand and cement is tamped there, depending on what they are making; if it is faced brick they are making it is tamped by mechanical operation, the machine being manually operated, into the molds. The surface material is then struck or raked from the surface. Then the water and cement is applied to the surface of the brick, and the same is agitated, different workmen having a little different technique in the method of operating but in the main it is the same. Then the final surface treatment depends upon the character of the bricks that they are making, that is, if to be wire drawn, or whatever the surface trim is to be." (P. 109).
>
> "I notice some of the workmen, they usually have a water pot in their left hand, and a cement bearing carrier in their right hand, and they ply the water across the brick and then back two or three times to thoroughly coat the surface of the brick. It is then agitated with an instrument to thoroughly agitate the surface coating of the structure. (P. 110).

The agitation was with some pressure and the function thereof was to mix the material that had been applied upon the surface and the moisture would have a tendency to enter the brick structure, filling up the interstices or pores of the bricks. (P. 110).

Mr. Bilyeu had also seen Ward and Peterson operate and described the process as follows:

"The faced bricks were made in two machines one of which was a manually operated machine. The material was shoveled into a hopper or upon the machine until the brick molds were filled. It was then rammed with a hand rammer; the surplus material was then struck from the face of the brick. Previous to that, upon an elevated platform perhaps three feet high and three feet square, I would say, a cementaceous material was placed and with a trowel a crater was made in which water was poured. A trowel was then used to make a mortar of the same material. It was then applied upon the face of the brick with a trowel, going back two or three times for more material until a complete surface coat was created. Then a whiskbroom was used; the whisk-broom was first dipped into a barrel of water; the face of the brick was then stippled where the coating had been applied with the trowel. They went back on at least two occasions for additional liquid, Mr. Ward being the brick-maker, stated that the broom having not been used and

being dry didn't work as well as it would had it been wet or had been thoroughly saturated with water before." (P. 111-112).

And then testified that in his opinion the result was the same by both appellee's and appellants' method, and that there was a penetration of the cement into the poers of the brick.

Mr. Shope testified that while they made mortar on the side and simply placed that on the face of the brick, the appellants placed it there by agitation and applied water and did this repeatedly, and that the application of water after the slurry wa san infringement, when agitation was effected by a metal trowel or a stippling broom, and Mr. Shope was constantly advised that appellants were making Shope brick and selling them at a lower price than appellee's prices.

Mr. Fielder testified that a year and a half ago he saw the appellants in the Shope brick plant and that they asked him what was the proportion of the cement used in mixing the concrete and he told them, as well as described some of the machinery; and that they left hurriedly upon the entrance of the foreman into the plant. At that time Mr. Fielder was making faced brick.

Mr. Claude C. Clark, also an employe of appellee, testified that he had seen appellants in the Shope brick plant on two occasions, one admittedly on the 14th of May, 1924, and the other about two years prior to that

when he saw Mr. Peterson measuring the length, depth and width of tile pallets and of the tile themselves; and that he was there for about ten minutes.

Appellent Ward states that he did make the faced brick as follows:

> "First the sand and cement was put in a mixer and mixed, and put in a machine and tamped. The top of it was raked off by a hopper that slides over the face of the plates, and on the side had a table like a plasterer's mortar board with neat cement on on that, or sand and cement, whatever I want, and I mix that up first; mix that up first before I make any brick for this neat cement, especially if warm weather—let that stand or set for a few minutes, and break the initial set, while you are getting your concrete ready—sort of break the initial set, that is the first set. When we make our brick we mix this up, well mix—use two trowels, and break it up; use one in place of the hopper the plasterer uses; plaster that on top; if a smooth brick, I quit there; makes it smooth, absolutely smooth brick; that is all done. The ends of this machine lets down with two little levers. Hold one trowel on the top, use it as a straight edge and plaster on the ends of these bricks which stick in the front of the machine about one-sixteenth of an inch, which allows us to place the plaster; they stick in the face of the machine about one-sixteenth of an inch so as to give us something to work on; stipple—have my

brush—keep my brush in a bucket of water. I have tried practically all the brushes I could find; I find the best is a common fifteen-cent store whisk-broom; keep it in a bucket of water, and keep it well soaked so the ends of it is not sharp and won't dig up your work, and make a rough finish, although middling smooth on account when clear no pockets or holes have dried in it; makes a nicer looking job to my mind than rough brick, by keeping the brush soaked. Then take out and set away to cool." (P. 139-140).

That he applied the coating mixture by a common Marshalltown metal trowel; that he never tried such a wooden float as the Shope brick company used because a wooden float had more of a suction and it would suck or pull the moisture right up, stir the sand up and roll up the cement, while a trowel is smooth and slides right over; that you can't agitate with a metal trowel; and that he tried to keep away from agitation; and denied that he was in Shope's plant a year and a half ago. The brick we use is a semi-dry brick, but in facing the cement is mixed on a board before it is put on a brick. We never applied dry cement and water to the brick and there is no penetration when you sprinkle on water then sift on cement unless you float it in and then you would roll up the concrete underneath your top covering and you make a less rich mixture for your facing as it stirs the sand up in it.

On cross examination, Mr. Ward stated that the whiskbroom he used to stipple with was always kept in a bucket of water. The reason was to keep the bristles soft and it was so kept moist all the time or it would tear off the face of the brick, but in awful hot weather they used to use water to keep the cement from setting too fast, that they threw water on the face of the brick then. The brush that he used laid in the water all the time and unless in awful hot weather, never used water only what was naturally in the brush, and on May 14th, he dipped the brush in the water three or four times. Sometimes he never again dipped after taking the brush out of the water the first time. His counsel stated for him, however, that he always intended to keep the brush wet and Mr. Ward admitted that a constantly wet brush will carry water.

Appellant Ward further stated that you could not agitate with a trowel and there was a distinction between his agitation with a metal trowel and the agitation by Mr. Shope with wooden floats, but he did not know whether Mr. Shope used a metal faced float or not.

Appellant Otto Peterson described the making of cement brick as follows:

> "Put it on with a trowel. I never made them. Mr. Ward is the man that always makes that. Takes one trowel and puts it on with that and finished the top, smooth finish, and finishes it with a fifteen cent broom, I think, anyway finishes the

top, lets the door of his mold down, and his long trowel on the edge in this manner, smears it on the same as plaster on the wall, or any other part." (P. 148).

He was in the Shope plant the latter part of March or first of April; that he never measured tile in the place.

On cross examination, he stated that twenty-five years ago he was in St. Paul, Nebraska, working for a man who ran cement brick mills and he, Peterson, used to run the yard, sort of foreman, when the other man was not on the job, and that he was manufacturing clay brick there, and that there was no cement brick there at that time.

Dr. Ralph K. Strong stated that there is a difference in the thickness of the layers of the different faces of Shope brick, in that the outer face may be traced further down into the Shope brick; that this is accounted for by the agitation on the Shope brick, but there was no evidence of penetration. They saw the Shope brick manufactured, and that he could best disclose that the vigorous agitation caused the thickness of the face to be greater in the Shope brick than in the Ward and Peterson brick by taking examples of each, and accordingly defendants' Exhibit "Y" was the Ward and Peterson brick and Exhibit "X" was the Shope brick; and after exhibiting them to the Court, stated that the reason the Shope brick shows a color part deeper is because much more vigorous stirring is used in the manufacture than

in the Ward and Peterson brick; and the difference he noted by the manufacture of the Shope brick and Ward and Peterson brick was that the Shope surface was agitated a good deal more. In fact, the Ward and Peterson brick was hardly agitated at all, only in troweling back and forth, the movements of the particles one upon another would amount to some mixing, at which point the Court asked:

> Court: "I suppose, Professor, you mean in plain English that one was rubbed more than the other?"
>
> A. "Yes." (P. 167).

Further Dr. Strong stated that the Shope troweling was then with what he believed to be a wooden float and the Ward and Peterson trowel was a thin faced steel trowel and he felt there was a distinction in this particular.

On cross examination, Dr. Strong admitted that there would be voids in the semi-dry cement block or brick and the putting upon the milk of cement, if the cement particles were smaller than the sand particles, that some of the cement particles would enter the interstices in the semi-dry block.

Dr. Werner testified that in the matter of pressing or agitation, that they amounted to the same thing and so far as the contention was made that a float would function differently from a trowel, that there was no

such distinction as both would have the same physical effect upon the surface.

It was at the close of the case stipulated that Shope not only used wooden floats but metal faced floats as well.

POINTS AND AUTHORITIES

I.

A patent is a contract between the government on behalf of the people and the patentee, the validity of which must be presumed, and the Patent Office continues to grant and the patent courts to sustain claims on the theory it is sufficient if the elements of any patents are so associated in a unitary structure and cooperates to produce either (1) a new mode of operation; (2) a new result; or (3) the old result in a modified or improved way.

Railroad Supply Co. vs. Hart Steel Co. (C. C. A. 7th 1915), 222 Fed. 261.

INVENTION AND ANTICIPATION

1. The question of invention is one of fact, not of law, but to be determined by legal principles.

Keen vs. New Idea Spreader Co., (1916) 31 Fed. 701.

2. Patents are not held void for want of invention, except where invention is clearly absent.

Hunt Bros. Fruit Packing Co. vs. Cassidy, (1892) 53 Fed. 260.

3. Invention is not clearly absent from the subject of a patent however simple, unless the subject was logically deducible from the prior art as disclosed by use, prior patents or printed publications in any country.

Weber Electric Co. vs. National Gas & Electric Co., (1913) 204 Fed. 79.

Williams vs. American String Wrapper Co., (1898) 86 Fed. 641.

French vs. Carter, (1890) 137 U. S. 239.

4. Anticipation or denial of invention cannot be based upon picking and choosing pieces here and there from prior patents showing each of the elements of a combination as a whole. The real test is whether the mental concept disclosed in and by the laws of the prior non-anticipatory patents left no room for a new and independent mental concept in bringing into working form the new process under investigation.

Railroad Supply Co. vs. Hart Steel Co., (C. C. A. 7th 1915), 222 Fed. 261.

5. A device that does not operate on the same principle as that in suit can not anticipate, and it is not sufficient to constitute anticipation that the device relied upon might, by a process of modification, reorganization or combination, be made to perform a function performed by the patent in question.

Los Alamitos Sugar Co. vs. Carroll, (C. C. A. 9th 1909), 173 Fed. 280.

6. Anticipation should be supported not merely by the testimony of one or more numerous witnesses relating to matters many years previous, but by concrete, visible, contemporaneous proofs which speak for themselves, and a testimony of credible witnesses was rejected because there were no contemporaneous visible objects of that nature.

Emerson & Norris Co. vs. Simpson Bros. Corporation, (C. C. A. 1st 1913), 202 Fed. 747.

7. Where it is sought to ascertain the state of the prior art by means of prior patents, nothing can be used except what is disclosed on the face of the patents and they cannot be reconstructed in the light of the invention in suit.

Naylor vs. Alsop Process Company, (C. C. A. 8th 1909), 168 Fed. 911.

8. The burden of proof of showing anticipation is on the person attacking on that ground or pleading such defense, and if doubtful, the patent should be sustained.

Victor Talking Machine Company vs. Duplex Phonograph Company, (1909) 177 Fed. 218.

9. Where patentee has materially advanced the art, any doubt should be resolved in his favor.

Washburn vs. Gould, (1844) 29 Fed. Cas. No. 17214.

NOVELTY AND UTILITY

Novelty is not negatived by any successful application for a patent nor by any documents pertaining thereto, different from the letters patent issued in pursuance thereof.

Harves vs. McNeal, (1880) 5 Baum & Ard. 77.

Novelty is not negatived by anything not substantially identical with the subject of the patent, even though the function of the prior process or thing was identical with that of the patented matter. This rule follows from the doctrine that a valid patent may be granted for a new means of producing an old result.

Untermayer vs. Freund, (1893) 58 Fed. 205, 209.

Nor is novelty negatived by prior patent which describes a device which is so similar to the patent in suit as to constitute an equivalent, if the prior patent gives no indication that the inventor of the prior patent contemplated that his invention is capable of the use of the patent in suit.

Canda vs. Michigan Malleable Iron Co., (1903) 124 Fed. 486.

The burden of proof of a want of novelty rests upon him who attacks the patent, and if by oral evidence, it should be clear and satisfactory, and every reasonable doubt should be resolved against the party alleging it.

Clark vs. Geo. Lawrence Co., (C. C. Or. 1908) 160 Fed. 512.

Walker "Patents" (5th Ed. 1923), Sec. 76, p. 93.

Novelty can only be negatived by proof which puts the fact beyond a reasonable doubt.

Barbed Wire Patent, (1892) 143 U. S. 284.

Walker "Patents" (5th Ed. 1923), Sec. 76, p. 93, note 95.

Oral testimony of many witnesses, if unsupported by any evidence consisting of documents or things, must be very reasonable and very strong, in order to negative novelty.

Emerson & Norris Co. vs. Simpson Bros. Corporation, (C. C. A. 1st 1913), 202 Fed. 747.

The fact the trial court decreed in favor of appellees on conflicting testimony is entitled to consideration.

Wilson & Willard Mfg. Co. vs. Bole (C. C. 9th 1915), 227 Fed. 607.

General public acceptance and use or utility are facts to be considered in favor of patentable novelty and evidence of invention.

Torey vs. Hancock, (C. C. 8th 1910), 184 Fed. 61.

Mouce vs. Adams, (1874) 12 Blatch 1; 17 Fed. Cas. No. 9705.

Utility is decisive evidence of invention only in case of doubt.

Hollister vs. Benedick Mfg. Co., (1885) 113 U. S. 59.

But its commercial success may be taken into consideration.

Coffield Motor Co. vs. A. D. Howe Machine Co., (1911) 190 Fed. 42.

INFRINGEMENT

A patent for a process is infringed by him who without ownership or license uses substantially the process which the patent claims; whether or not he uses substantially the apparatus described or material prescribed by the patent, or equivalents therefor.

Tilghman vs. Proctor, (1880) 102 U. S. 730.

There are two tests of equivalency: (1) identity of function; (2) substantial identity of way of performing that function.

Steam Gage & Lantern Co. vs. Rogers (1886) 29 Fed. 453.

New Departure Bell Co. vs. Bevin Mfg. Co., (1894) 64 Fed. 859.

Read Machinery Co. vs. Jaburg, (1915) 221 Fed. 662.

A patentee, having described his invention and shown its principles and claimed it in that form which most perfectly embodies it, shall, in contemplation of law, be deemed to claim each form in which his invention may be copied unless he has manifested an intention to disclaim some of these forms.

Western Electric Co. vs. LaRue, (1891) 139 U. S. 606.

One thing to be the equivalent of another must perform the same functions as that other. If it performs the same function, the fact that it also performs another function is immaterial to any question of infringement.

Machine Co. vs. Murphy, (1877) 97 U. S. 125.

Foss vs. Herbert, (1886) 2 Fisher 31.

Sarvin vs. Hall, (1872) 9 Blatch 524.

Comptograph Co. vs. Mechanical Accountant Co., (1906) 145 Fed. 331.

ARGUMENT

"Patents often lend themselves to fine spun theories, but it is singular how plain they are, if they are worth anything, to the man who wishes to infringe for profit."* We turn immediately to argument in this form:

I. Is the patent invalid because
   (a) anticipated in the prior art?
   (b) of lack of invention?
   (c) inoperative?

II. Did appellants not infringe because
   (a) of the invalidity of appellee's patent?
   (b) their process of waterproofing faced cement brick was substantially different from Shope's?

Answers to these questions in the negative will justify the Patent Office in the issuance of Shope's patent, and Judge Wolverton in the issuance of a preliminary injunction and Judge Bean in his decision at the conclusion of the trial on the merits, as well as deny the seven assignments of error (47), refute defenses involved in the above form of argument, and sustain this contract between the United States government and the appellee as a new mode of operation in making brick facing.

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*Circuit Judge Charles M. Hough in General Electric Co. v. P. R. Mallory (C. C. A. 2nd 1924), 298 Fed. 579, 588.

I. (a) Anticipation in the prior art of waterproofing faced cement brick is attempted to be proved by appellants in two ways: (i) the oral testimony of witnesses claiming to have used the method twenty or more years ago; and (ii) by printed patents dated prior to Shope's patent of February 28, 1911.

Four witnesses gave oral testimony of use in the prior art. Two were interested parties, Appellant Peterson saying: "I am not much of a cement man." "I never made them (the bricks)". He had *heard* about the manufacture of cement brick for some time (148-150). Appellant Ward used a trowel to apply a surface coating to a block twenty years ago in Iowa. Angus Fleming troweled dry sand and cement sprinkled over abutments of the Grand Avenue Bridge "very near forty years ago", (123) and G. E. Starks used dry facing on caps for porch pillars in Michigan thirty years ago. Neither of the last two witnesses had ever seen the process as practiced under Shope patents. The Court need give to Peterson's testimony no greater respect than he claimed. The uncertainty and irrelevancy of this oral testimony to the Shope process as herein defined can only be appreciated by reading it. Appellants' Brief (p. 46) gives but one sentence to this testimony. This feature of the case may, we submit, be disposed of by principles announced by Judge Putnam in the case cited in appellants' brief with great respect:

> "This case (Brooks v. Sacks, 81 Fed. 403, 26 C. C. A. 456) however, developed the underlying

rule, that ordinarily in cases like the present, it is necessary that the anticipation should be supported, not merely by the testimony of one or numerous witnesses relating to matters many years previous, but by concrete, visible, contemporaneous proofs which speak for themselves. In that case, the testimony of credible witnesses was rejected because there were no contemporaneous visible objects of that nature, and solely for that reason. * * * There we said that the evidence of anticipation must at least meet the expression in Morgan v. Daniels, 153 U. S. 120, there repeated, namely, 'that the proof must at least establish a clear conviction,' and we further explained that in this respect the action of the department was to be held to be of the high character which was required in the Maxwell Land Grant Case, 121 U. S. 325, and United States v. Bell Telephone Co., 167 U. S. 224. The result of these cases is that, with reference to questions of the class which we have here, namely, the identity of structure as between what is patented and what is alleged to have anticipated it, something more than oral testimony, even of the highest character, is required where there has been a considerable lapse of time.' (P. 750.) 'In the lapse of time the memory becomes especially confused as to the identity of matters similar in part, and especially of processes.' " (P. 752.)

Emerson & Norris Co. vs. Simpson Bros. Corporation, (C. C. A. 1st 1913), 202 Fed. 747.

Appellants evidently did not want this prior use inquired into because after pleading the general issue, they gave no notice of this testimony by allegation in this complaint or as required by Section 4920, U. S. Rev. Statute, 7 Fed. Stat. Anna. 309:

> "In any action for infringement the defendant may plead the general issue, and, having given notice in writing to the plaintiff or his attorney thirty days before, may prove on trial * * * That it had been in public use or on sale in this country for more than two years before his application for a patent * * * "

Speaking generously, appellants, having the burden of proof, have certainly not sustained it under the above admitted rule.

(ii.) Appellants' strongest, if not their sole hope to win their appeal rests on their counsel's ability to show Shope's patent invalid as anticipated by the printed patents in evidence. This is their strongest point disclosed by the emphasis given it in their brief.

Before discussion of the patents, attention is called to the great emphasis both in the Transcript and Brief, placed upon the file wrapper of the Shope patent. The argument appears strained and the use of the wrapper for the purpose disclosed is, in one circuit, prohibited, upon, we submit, sound reason:

"Therefore the successive rejections of this claim necessarily involved the rejection of the construction which the plaintiff seeks to put upon the patent at the present time—or at least, so it seems to us—and concludes it by estoppel from the interpretation which it now seeks to put upon those claims which the patentee eventually got. We take this occasion, however, once more to say that in the consideration of a file wrapper we do not look at the arguments of the applicant to the examiner. We wish it to be understood that, as we conceive the purpose for which the file wrapper can be examined, it covers simply the question of estoppels through rejected claims. The whole doctrine is somewhat anomalous at best, since it involves looking at preliminary negotiations in the interpretation of a formal document intended to be the final memorial of the parties' intentions. The practice, however, is too well settled for us to disturb, and we have no intention of casting any doubt upon it. This court, nevertheless, has twice already disapproved the practice of bringing into that interpretation the arguments of an applicant. Westinghouse Electric Co. vs. Condit Elec. Mfg. Co., 194 Fed. 427, 430, 114 C. C. A. 389; Auto Pneumatic Action Co. vs. Kindler & Collins, 247 Fed. 323, 328, 159 C. C. A. 417. We repeat now that disapproval."

A. G. Spaulding & Bros. vs. John Wanamaker, (C. C. A. 2nd 1919), 256 Fed. 530.

The doctrine so firmly established has most recently been reiterated.

> General Electric Co. vs. P. R. Mallory & Co., (C. C. A. 2nd 1924), 298 Fed. 579.

There were twenty patents cited in the answer as anticipating the Shope process, they were introduced (p. 151) under a stipulation of counsel and without a word of evidence or argument of counsel to aid the court in their interpretation. Appellee's expert testified as to their differentiation from Shope, which brought forth cross-examination on four only.

Appellants show great respect for this expert testimony for thirteen of the cited patents are presumably abandoned because they are not brought down in the record, nor are they mentioned in their brief. These are clearly out of consideration.

> "An analysis of all prior patents we deem unnecessary. If the strongest references can not prevail, it would be profitless to review the others." (p. 269.)
>
> Railroad Supply Co. vs. Hart Steel Co., (C. C. A. 7th 1915), 222 Fed. 261.

Of the remaining seven patents, appellants admit but six are concerned with anticipatory art. It is in-

teresting to note that no cross-examination was risked on either the Goode, Frederici or Thomas patents. The latter is one on which so much stress is now laid. And there is not a scintilla of evidence before this court interpreting any of these patents for appellants. If commercial piracy, committed by those not "worth while in a material way," is to deprive the appellee and investors in the United States and Canada of a joint investment of a half million dollars, initiated by the United States Patent Office, and lulled into a sense of security by thirteen years of public acquiescence, by the introduction of patents not disclosed as being in use, which were known to or in the patent office when the Shope patent was there, the anticipatory patents should certainly merit the dignity of an expert to show the Court if possible the absolute invalidity of the Shope process. In view of the seriousness of this case to appellee and the light manner in which appellants treated the alleged anticipatory patents in the trial court, appellee now requests the Court to disregard all these patents. Precedent and justification for such course are ample:

> "The specifications and drawings of the patent in suit are indefinite and incomplete, anticipation is claimed, but the defense is only suggested by injecting a large number of prior patents into the record without any explanatory testimony, and, apparently for this reason, the court below has filed no opinion, except a statement that the claim in suit is valid and infringed. If an examination of the prior art were necessary to the decision of

the case, we should not sustain the defense of anticipation upon such mere production of patents for complicated combinations of machinery."

Bell v. MacKinnon et al (C. C. A. 2nd 1906) 149 Fed. 205.

"To sustain the defense of want of novelty the defendants have set up in their answer, and offered in evidence, a large number of patents prior in date to those of the complaint. In the absence of any expert testimony to explain these patents, or indicate what they contain tending to negative the novelty of the complainant's patents, we do not feel called upon to examine them. There may be cases in which the character of the invention has so little complexity that such expert testimony is not necessary to aid the court in understanding whether one patent, or several patents considered together, describe the devices or combination of devices which are the subject-matter of a subsequent patent; but this is not one of them." (p. 987).

Waterman v. Shipman et al (C. C. A. 2nd 1893) 55 Fed. 982;

See General Electric Co. v. Germania Electric Lamp Co. (C. C. N. J. 1909) 174 Fed. 1013. and cases cited there.

"A large number of prior patents have been placed before this court without evidence explaining them or their operation and it would be proper to wholly disregard them." (p. 429).

Benbow-Brammer Mfg. Co. v. Heffron-Tanner Co. (C. C. N. Y. 1906) 144 Fed. 429.

If this Court does consider these six patents, in order that appellee may not be in a position of disrespect, the following differentiation is shown:

Taken collectively, appellee's expert witness went the full limit in aid of appellants case in a statement admitted by opposing counsel to be "perfectly fair and perfectly true."

The art is as ancient as the pyramids, in its broad sense. An enormous amount of work has been done. Many men have endeavored to make blocks and most everything in creation out of cement. Some of them have attempted to make the very identical product, of course. There is no doubt you will find far more than I have been able to get indicative of a desire to do so, and many suggestions which taken and assembled will give us the Shope theory. In my mind is this: I have been unable to find specifically either sequentially or otherwise, as I interpret, the thought of mixing —may I call "in situ"—I can't assist you here. In

> my mind this patent states—it is either that or nothing. I will make it very easy for you; mix "in situ", that is what this patentee wishes to do. Whether he puts the water first or last or what he does, this is his invention as I see it.

Concerning the remaining six patents, the point is tenderly referred to in the appellants' brief generally at page four and in their discussion of the deceptive appearance of infringement at page sixty.

A more recent principle applicable to the presumption of validity of the Shope patent as against the patents cited by appellants, is ably expressed as follows:

> "Another consideration is the presumptive validity of a patent. From long and continued repetition of the phrase the members of the patent bar and of the patent bench sometimes may seem to get into the condition of the man who repeats a word over and over until it fails to convey any meaning to his mind. But this presumption should be given more than formal recognition. A 'patent' is a contract between the government on behalf of the people and the patentee. The grant of a patent might have been made conclusive evidence of its validity except against suits by the government for fraud or mutual mistake in the issuance. But the fact that certain defenses are left open to the individual should not make us lose sight of the nature of the presumption that attaches to the grant.

Not merely has the application been examined on behalf of all the people by experts who have access to all the prior patents and publications of the world; not only has the applicant spent his time and invested his money in procuring the patent; but in most of the important cases the patentee and those working under him have invested very large sums in buildings and machinery and have expended other large sums and put in great energy and effort to build up, by advertising and salesmanship, a profitable business. And this is done before any one challenges the presumptive validity of the patent. Courts therefore should not view the application as of the date of its filing and constitute themselves into a board of reviewing examiners and on nicely balanced considerations find that the Patent Office examiners were in error; but they should consider the patentee's equities in his business which has developed under the presumptive validity of the patent, should give heed to the place achieved by the patented article in the field of the practical art since the date of the patent, and should therefore decline to sustain the defense of noninvention and to strike down the patent and the business built upon it unless that defense has been established beyond a reasonable doubt. In this case we find that the appellees have not so maintained their defense." (P. 274).

Railroad Supply Co. v. Hart Steel Co. (C. C. A. 7th 1915) 222 Fed. 261.

Taken the patents separately, in chronological order: In Patent No. 518,239 of Goode (p. 254) there is not even the semblance of an intimation of Shope's invention. No additional water is applied; the artificial stone hardens in the mold, "usually for about twenty-four hours." Shope particularly mentions this, and discards it for his improvement (p. 213). Appellants give this Goode patent scant reference (Brief, pp. 34, 43). Appellee should have equal liberty. The process can not lend itself to commercial mass production.

Goode repeatedly sifts neat cement on the surface; as long as water oozes from the block. Mixture of water and cement *may* be smoothed down and will form a waterproof skin in the sense of Shope. There is no suggestion of making the aggregate in form to be immediately removable from the mold, nor is there information as to making the body of the block dry enough to merely hold together and by the *addition* of sufficient water carrying the cement to fill the interstices of the surface. Goode specifically states that to obtain his result the mold must be kept for about 24 hours before the block is hard enough to be removed. Primarily his intention is to obtain a beneficial result by the use of lime water to the surface of the stone. He mentions (Page 2, line 4, etc.) that his stone can be produced without such lime treatment.

Dr. Werner stated in cross-examination (p. 194) Shope's brick can be made by a number of the patents cited; one of them being Goode. The question is of mixing *in situ*.

Patent No. 527,416, of Federici (p. 258) is dignified by one reference in appellants' brief (p. 22) wherein appellants distinguish the patent from Shope in the statement: "Federici in 1894 regarded as unpatentable what plaintiff is now attempting to claim." Shope is not accountable for Federici's mistakes. This patent describes and visualizes large pebbles in a liquid mass of cement which is hardened in the mold, having in mind nothing more than a building block, and covers an article of manufacture, and is not a process patent: (p. 207).

In the patent in lines 63 to 90, patentee by disclaimer emphasizes what he means. Line 73 and onward he says * * * "but I am *not* aware that a building block has ever been constructed with exposed surfaces consisting of very small pebbles partially imbedded in the layer of pure cement." His claim fully substantiates this as does figure 3 discussed in cross-examination. Figure 2 is a plane view of the face of the stone (Lines 24 and 25). It must not be construed as a section. Figure 3 is a section.

There is no relation between this and Shope other than that Federici's stone might be waterproof for all we know and care. It does not use the steps of Shope nor suggests them.

Patent No. 531,842 of Haddock (p. 262) is one of the two patents now emphasized by appellants, whose brief emphasizes largely the cement block which is ad-

mittedly old in the art. It is the facing Shope emphasizes and where is there a clear and concise and specific statement in Haddock's patent or appellants' brief that if you mix on the top of the brick you will get a result? Shope specifies the amount of water to be used, Haddock does not. A lengthy differentiation of this patent from Shope by Dr. Werner has already been included in this brief (pp. 18-21).

It is useless to repeat. The U. S. Patent Office saw the distinction and withdrew this patent from an anticipation of the patent in suit. Appellants' attempt to piece together Haddock and Goode, as well as others, to anticipate Shope, is not lawful.

> " * * * In order to negative novelty or as it is usually expressed, to 'anticipate' an invention, it is necessary that all of the elements of the invention or their equivalents be found in one single description or structure where they do substantially the same work in substantially the same way."
>
> Walker "Patents" (5th Ed. 1923) g52, p 67.

Briefly further differentiating Haddock from Shope we find mixing "in situ" again is the differentiation and the issue. Following Haddock's instructions you do not practice even the first claim of the Shope Patent, for Haddock's conception is a three layer one structure and you can not stop short of his result to find something of Shope. We wish to emphasize that agitation, that is, mixing *"in situ"* is not in Haddock.

Novelty is not negatived by anything not substantially identical with the subject of the patent even though the function of the prior process was identical with that of the patented one. This rule follows from the doctrine that a valid patent may be granted for a new means of producing an old result.

Patent No. 703,644 of Davies (p. 266), is for making cement fence posts and dipping them in a "bath of liquid hydraulic cement" and hardened in the mold, which Shope's process is designed to avoid. This is cited to show the outside waterproof coat was old. (Brief p. 34). Admit it and we shall have invention and patentability if the Shope patent does an old thing in a modified or improved way (Railroad Supply Co. v. Hart Steel Co. (Supra P. 32) and appellee claims it does by his method of mixing. Picture a business of manufacturing fence posts under Davies patents, then visualize such business making either round or square fence posts under Shope process! Shope's result is secured by Davies' cumbersome steps, but Shope's is vastly different from Davies' process which does not lend itself to commercial production. For testimony of detailed distinction, see this brief p. 21. Davies removes the molded material before it has become entirely set and dips the article one or more times in a bath of liquid hydraulic cement of such fluidity that it will run smoothly and evenly over the entire exposed surfaces of the post and fill all cracks, crevices and interstices.

There are only two objections to this. First, it can't be done and second, what will be done with the bricks, between dippings. Granting that it can be done, it still in nowise anticipates Shope's mixing *"in situ"*.

"It should also be borne in mind in considering this subject that reasoning by analogy in a complex field like chemistry is very much more restricted than in a simple field like mechanics. This distinction has been frequently recognized by the courts.

'Of course, a discovery to be patentable must have the attributes of invention; but the mental operation is somewhat different in one who invents a machine and one who discovers a process. * * * The mere selection of a material, and this, too, by a process of exclusion, has been deemed sufficient to sustain patentability, and the patent law abounds in instances in which patents have been upheld where the inventor stumbled upon the discovery in total oblivion of the reason why effect followed cause.' * * *

"We shall not lengthen this opinion by quoting extracts from decisions to illustrate the principle."

"The same principle is admirably illustrated by Lord Justice Vaughan Williams, in his opinion involving the Andrews patent. In discussing the limitation of the doctrine of equivalents in patents based upon a chemical process, he says:

'It was urged on behalf of the petitioners that Frichot's patent was an anticipation of Andrews' invention, because all oxidizing agents which liberate nascent oxygen are chemical equivalents, and if you once have a man say, 'I proposed to bleach flour by nascent oxygen which is liberated from ozone,' that is an anticipation of the subsequent patent, which says, 'I propose to bleach flour by an oxidizing agent of another character which only operates, and can only operate, by the liberation of nascent oxygen or its equivalent.' The answer to this is put in this way: *That you cannot apply the doctrine of mechanical equivalents to a chemical patent,* because you cannot predicate that all oxidizing agents will act in the same way, and cannot, therefore, predicate that in conditioning flour an oxide of nitrogen, or an oxidizing agent of the chlorine or bromine type, will act in the same way as ozone or any other oxidizing agent mentioned in Frichot's patent.' * * * (P. 919.)

"The learned judge qualified the language which we have italicized later in the opinion when speaking of the doctrine of equivalents in chemical cases, and states the correct rule with remarkable precision as follows:

'The doctrine does apply in cases where, having regard to the subject matter, it can be truly asserted that one of two or more chemical substances *is well known as producing the same effect on the same subject-matter.*' * * * (pp. 919-920.)

"When it is sought to ascertain the state of the art by means of prior patents, nothing can be used except what is disclosed on the face of those patents. Such patents cannot be reconstructed in the light of the invention in suit, and then used as a part of the prior art."

Naylor v. Alsop Process Co. (C. C. A. 8th 1909), 168 Fed. 911.

Patent No. 751,089 of Mallette (p. 276), in appellants' eyes merited no cross-examintaion and no comment in brief other than one general reference (p. 22). The patent is for concrete building blocks in the manufacture of which patentee pours a liquid cement into a mold filled with coarse aggregate. Mallette is one of the many users of fine slurries poured upon the aggregate to fill the interstices. No question that intelligently practiced stone waterproofing in the sense of Shope could be produced allowing the stone to harden for hours or days in the mold. As to agitation there is no suggestion; as to mixing *in situ,* there is not even an indication. It is a rather clumsy sort of an idea. The patentee seems to be under the impression that to get a good stone, the large fragments of his aggregate must individually be covered with mortar to adhere to each other. Presumably he wishes to have enormous interspaces so that his liquid slurry may penetrate as far as possible like Hassam.

Patent 958,194 of Thomas (p. 270) springs into prominence in the brief only. Its admission in evidence was neither dignified by explanation or its supposed effect accentuated by cross-examination. The patent is not in operation. While the Thomas patent was filed in the patent office October 12, 1907, and Shope did not make his invention until 1908, there is no showing that Shope ever knew of the existence of the Thomas idea or application.

> "An application prior to the patent in suit can have weight only if there has been some actual use of the invention, so that there may be elements of publicity. Such an application cannot be said to be a part of the prior art unless this element of publicity is present." (p. 546.)

Thomson-Houston Electric Co. vs. Ohio Brass Co.. (C. C. Mass. 1904), 130 Fed. 542.

Approved in Alvord v. Smith & Watson Iron Works et al (C. C. Or. 1914), 216 Fed. 150.

Appellants cite authorities on the presumption of validity to show how frequently Courts have overcome it (p. 25). That has nothing to do with the case at bar. The presumption of validity of the Shope patent is covered by decisions of the Supreme Court listed in the following excerpt:

> "'A patent should be construed in a liberal spirit to sustain the just claims of the inventor.

This principle is not to be carried so far as to exclude what is in it, or to interpolate anything which it does not contain. But liberality, rather than strictness, should prevail where the fate of the patent is involved, and the question to be decided is whether the inventor shall hold or lose the fruits of his genius, and his labors.' 'The court should proceed in a liberal spirit, so as to sustain the patent and the construction claimed by the patentee himself, if this can be done consistently with the language which he has employed.' 'In a case of doubt, where the claims is fairly susceptible of two constructions, that one will be adopted, which will preserve to the patentee his actual invention.' 'The object of the patent law is to secure to inventors, a monopoly of what they have actually invented or discovered, and it ought not to be defeated by a too strict and technical adherence to the letter of the statute, or by the application of artificial rules of interpretation.'" * * *

"That liberality as often shows itself in a narrow construction as in a broad one; for narrow construction may be as necessary to establish the validity of a patent, as a broad construction is to lay the foundation for proof of its infringement. Therefore when it becomes necessary to construe a claim narrowly, in order that its novelty may not be negatived by the prior art, or its validity otherwise overthrown, courts will give such a narrow construction, if they can do so consistently with the

language of the claim and of the description. On the other hand, a claim will not be narrowed by importing into it, by construction, any dispensable element, in order to enable an infringer to escape the consequences of his infringement."

Walker "Patents" (5th Ed. 1923) Sec. 185, p. 247.

"It has been held in several circuits that when no practical use has been made of the patent the claims will be narrowly construed, the reason for so holding being that in such a case the patent lacks the support that comes from public acquiescence. And as a corollary to this proposition it is held that where the invention is a practical success and constitutes a distinct advance in the art the claims are entitled to a liberal construction."

Walker "Patents" (supra) Sec. 185a, p. 248.

The above rules are particularly applicable in the case at bar, and with the rules of presumption of validity of the patent in suit so established, appellants have not pointed out wherein the Thomas patent has overcome them. One-half of appellants' argument in brief quantitatively considered, is devoted to showing the block described as hoary with age in a crowded art. Admitted. But there is not described in Thomas a process of mixing *"in situ"* by which a definite result

is reached. The theory of Thomas is simply to take two slurries, superimposing the one of higher plasticity on the one of lower plasticity, and emphasizes that excess water is used for crystallizing the lower portion and not the facing. This is not Shope.

> "A device which does not operate on the same principle cannot be an anticipation." (p. 284.) "* * * It is not sufficient to constitute anticipation that the devices relied upon might, by a process of modification, reorganization, or combination with each other, be made to accomplish the function performed by the device of the patent sued on." (p. 285.)
>
> Los Alamitos Sugar Co. v. Carroll (C. C. A. 9th, 1909), 173 Fed. 280.

Patentee has trouble with producing facing sufficiently dry to immediately remove (pp. 55-65) and this criticism is fully substantiated by his claim of "sifting on such surface powdered stone and cement to stiffen the surface of the facing, and prevent the escape of moisture therefrom." This patent will produce a faced brick similar to Shope's but by a different method. Briefly we put Shope's mixing *"in situ"* on one side of the scales of justice and rest assured it will outweigh the cited patents and argument thereon, on the other.

The epigram cited by appellants "That which infringes a patent if later, would anticipate it if earlier"

is not true in this case under the criticism thereof offered by Walker "Patents" (5th Ed. 1923) p. 77.

Appellants on an issue of anticipation have the burden of proof thereof. Where the identity of method and results in the two devices is not proved or doubtful, the doubt must be resolved in favor of the patent.

> Victor Talking Machine Co. et al v. Duplex Phonograph Co. (C. C. Mich. 1909) 177 Fed. 248.

And the measure of this burden of proof is of the same degree as in criminal cases, beyond a reasonable doubt.

> Clark v. Geo. Lawrence Co. (C. C. Ore. 1908) 160 Fed. 512.

We submit it can not be said the degree of alleged proof in this case has risen to any such dignity.

I (b) Appellants' next claim against the Shope patent is that "nothing shown by the patent involves invention." If invention should mean "something new under the sun," in an academic sense it would be doubtful if the human race or any of its members ever *invented* anything. But there are untold instances where taking existing things and natural laws, and putting them in combination, something new in method or substance is *discovered*. "A new process is usually the result of a

discovery; a machine of invention." Tilyman v. Proctor, 102 U. S. 722. In patent law it is in this sense "invention" is used. Shope discovered that by following the process described in his patent a waterproof face was put upon a block which you could not chip off as could be done to other processes of facing, and that principle has been the basis for a new era in building and building material. Appellants find themselves in this dilemma: If there is no invention in Shope, how is it that so many patents, of course valid (which must include invention), anticipate him?

> Speaking through Justice Knowles, this Court said: " * * * the patent, when introduced in evidence, is prima facie proof of its own validity, unless it appears on its face not to be such a document as the statute prescribes, * * * the burden is cast upon defendant to show * * * the patentee is not the first inventor". (p. 259). "But the want of invention in a patent is a matter of defense unless the thing for which a patent is claimed shows on its face that it is without invention". (p. 260).
>
> Hunt Bros. Fruit Packing Co. v. Cassidy (C. C. 9th 1892) 53 Fed. 257.

No reference is made by those seeking to destroy appellee's patent to this testimony produced by questions of learned counsel for appellants:

Q. "I won't indulge in discussing words, but that is what he is undertaking to do to tell the world he has made some improvement in the method of waterproofing cement blocks?"

A. "And I tell you, as far as my investigation goes, he did. I can see in the light of what he has told me that you can practice him without subtraction or addition of certain matter from the language of other patents, and I have fairly tried in literature of the art, or in the patents, to find this simple statement in a simple fashion, to find the specific direction, but I have been unable; perhaps you are." (p. 204-5.)

There is no oral testimony to refute the above conclusion and appellants must depend upon the argumentative testimony of their counsel to show lack of invention by other patents.

"Under such circumstances courts have not been reluctant to sustain a patent to the man who has taken the final step which has turned a failure into a success. In the law of patents it is the last step that wins. It may be strange that, considering the important results obtained by Kelly in his patent, it did not occur to him to substitute a coiled wire in place of the diamond shape prong, but evidently it did not; and to the man to whom it did ought not to be denied the quality of inventor. There are many instances in the reported decisions of this court where a monopoly has been sustained

in favor of the last of a series of inventors, all of whom were groping to attain a certain result, which only the last one of the number seemed able to grasp." (pp. 282-3.)

The Barbed Wire Patent (1891), 143 U. S. 275.

Testimony last above quoted places Shope in the position of Weber in the following statement of the law:

"When a desired result is sought by those working in the art and skilled therein, but not obtained for lack of efficient means, which such persons are unable to devise, and another comes into the field and by some seemingly simple change and adaptation of an old means or element in a combination of elements to the doing of the work is able to do the desired work, accomplish the desired result, a new result, or a better result, by such new means operating differently from anything known in that art, or an analogous art, and such device proves commercially successful, and largely displaces all others, and is more efficient and just as durable, or even more durable, and is less costly in construction, do we have invention, or do we not? The electrical art is not old. The construction of electrical appliances is in its youth. True, Weber did not startle the electrical world, or make a daring plunge into the unknown; but he did conceive and make an improved and a safer and a less expensive in-

candescent electric lamp socket, which, on its merits, has gone into general use and substantially monopolized the trade. All this is persuasive evidence of invention. He 'added something of value to the sum of human knowledge,' he 'made the world's work easier, cheaper, and safer,' and 'a return to the prior art would be a retrogression.' The device has achieved undisputed success, and accomplishes a result not obtained before in this important field. The device is new, useful, and in large demand. Therefore the device is patentable, and there was invention." (p. 85.)

Weber Electric Co. v. National Gas & Electric Fixture Co. (D. C. N. Y. 1913), 204 Fed. 79.

"The law which we believe is applicable to these facts has been frequently declared and may be briefly summarized. Invention of a combination does not lie in gathering up the elements that are employed, but consists in first conceiving that a new and desirable result may be attained by bringing about a relationship of elements which no one has before perceived and then going forth to find the things that may be utilized in the new required relationship. In an old and well-developed field the apparent simplicity of a new device is often the highest evidence of inventive genius. So far as human minds are able, judges should exclude from view the disclosure of the patentee, should

regard the patentee's problem as of a time antedating the application, and should therefore not too readily accept the ex post facto wisdom of the bystander. Prior art structures are to be examined in view of the purposes and laws of such structures. It is not enough that a prior art device approach very near the idea of the patent in suit; it must so clearly disclose the idea that it would be apparent to a mechanic of ordinary intelligence who was not examining the device for the purpose of discovering in it the idea of the patent. For, if he already had that idea, he would not be getting it from the prior art device, but from his own imagination or some other source." (p. 273, citing many cases.)

Railroad Supply Co. v. Hart Steel Co. et al (C. C. A. 7th 1915), 222 Fed. 261.

A strong and more lengthy statement of the characteristics of invention to be applied here was made by this Court at page 283 in the case of Los Alamitos Sugar Co. v. Carroll (C. C. A. 9th 1909), 173 Fed. 280, citing the Supreme Court in accord. It is very familiar to this Court.

I(c) The Shope patent is not invalid because inoperative. We may safely start with the premise that Shope's process has done something to a cement brick to effect a demand, sale and use of "two to three hundred thousand face brick per day" (p. 60). This fact

does not easily lend itself to the argument the process is inoperative.

Appellants confine the claim the patent is "inoperative" to an alleged disclosure the patent will not do what it says it will, and in support thereof cite the following evidence: (1) The application described in Shope was effected in the patents above discussed (p. 46); (2) these patents and Shope obtain the same *result* (p. 47); (3) cement particles will not enter the interstices between particles of sand compacted in mass as shown by Starks, Fleming, Appellant Ward and Dr. Strong (p. 47); and (4) the Hassam (p. 50) and Stevens patents (p. 51) in their respective adjudicated cases.

There are two answers to the first suggestion. It is strange, if the process in suit is inoperative that others dignified it, according to appellants theory, with patenting the same thing, or if it was so old in the art, they omitted it, the citation of patents as infringing Shope was without the sincerity attributed to their disclosure. Again Dr. Werner's testimony and the fact that you might get the "same result" in other patents, is immaterial. This is a *process* not a *product* patent. This answers the second reason as well.

Further, there is no substantial testimony before the Court that cement molecules will not enter the interstices of a brick under Shope process. All Shope needs is "some" penetration to make a face brick, waterproofed and which can not be chipped off. Stark

admits some penetration (p. 138). That is sufficient. But the inadequacy of Stark's and Fleming's testimony has been disclosed. Neither ever saw a Shope brick made. Ward says he "tries to keep away from agitation," if so and there is no penetration, why could one not with a pocket knife chip the face off of a Ward & Peterson brick without any substantial part of the cement block with the chipped portion of the facing? Dr. Strong never made a Shope brick as did Dr. Werner. Dr. Strong took "sand itself" (p. 157) which he says offers a "maximum of voids" for his experiment. Naked observation will show the Shope brick exhibits (Pf. Exhibits 11, "A," "B," "C," "D" and 11 "E," 12 and Def. Exhibit "X") have greater voids when hardened with cement than a block of pure sand, admittedly not specified in the patent. Dr. Strong admitted there would certainly be some voids, and if water and cement in high plasticity were applied to these voids, "if the void is larger in diameter than the particle of cement is in diameter, of course it will fall in." (p. 170) and further stated "There isn't any void large enough to take care of the cement particles" (p. 159). For this reason Dr. Strong said there could be no penetration. He further used the example of filteration. As against such testimony and conclusions, we submit the following: If appellants mean that water did not carry cement particles to the bottom of the brick, we agree. Such is not necessary or required by the patent. The process of filteration does not mean that all particles go to the bottom of the filter medium. Witness Dr. Strong's own

testimony of putting the "clouded" liquid back through the filter until "shortly after you have carried that on, a liquid comes through clear." Dr. Werner testified from Standard Government specifications that twenty-five per cent of ordinary cement will float upon a 200-mesh sieve, and twenty-five per cent of these particles will be finer than 2/10000 of an inch, which is well within the border land of suspension and by taking a large quantity of water and small quantity of cement, one could use in part a collodial suspension which would pass through a filter, and no difficulty could be seen why they would not enter the superficiary pores of a Shope brick. As fixing the quantity of water to be used the patentee says "sufficient" to enter the pores (p. 175). So much for theory, but in addition Dr. Werner made preliminary tests in his laboratory at St. Louis, Missouri, on a fairly extensive scale and then made tests at the Shope brick plant in Portland, Oregon, to observe whether the commercial operation coincided with both his laboratory experiments and patentee's description of his process (p. 186). Take Shope brick Exhibit 11-A which was made under Dr. Werner's direction, reading to the workman, the steps from the patent. Penetration is shown in a "most drastic fashion" (p. 187). Exhibit 11-A was stippled and Exhibit 11-B was finished smooth with a trowel (p. 188) and while made the night previous to its introduction in evidence, was broken in court and while still fresh exhibited to the Court and for the record Dr. Werner testified it "unquestionably" showed penetration. Evidently through incredulity of Dr. Strong's testimony, Dr.

Werner made another test, not of a commercial product, but to show penetration of white cement into black coke. The process and result showing penetration is described. (Supra, p. 14.)

The effect of agitation accentuates this natural operation, but it will be noted that appellants do not attack this phase of the patent, but seek to avoid it under infringement. (Supra, pp. 30-31.)

The last line of attack is the anomalous one of arguing the inoperative features of the Shope patent from court decisions. Judge Bean held one not evidence (p. 155). Opposing counsel ably distinguishes Hassam from Shope. Hassam was used as an illustration on cross examination to see if a witness would admit a smaller particle might go into a larger hole in another body. He admitted it. The patent is of no further interest.

The Stevens patent was cited in the answer to show anticipation of Shope (p. 32). Appellants now gracefully and properly abandon that position (Brief, p. 54) and find a new use for it. If Stevens' patent says Shope is not operative—then why should counsel cite Davies and other patents as valid and anticipatory of Shope, for they must all be inoperative as well. Shope does not say "all cement will enter the pores," Stevens does not say "None of the cement will go into the relatively dry sand." Appellants' argument avoids any middle ground. In logic, it is bad, in fact it is disproved.

Enough cement under Shope process enters to make a waterproof cement face.

Appellants challenge that "The operativeness of the alleged invention, although positively denied, was not attempted at the trial to be proved," (Brief, p. 9) is inaccurate. The trial court was asked to visit the plant and witness operations, and if it had possessed any doubt would have so availed itself (p. 168).

II (a) The question of whether appellants have infringed appellee's patent has been treated by opponents in two phases. The treatment of seeking to avoid infringement by declaring appellee's patents invalid depends for success upon invalidity and, we submit, the validity of the Shope patent positively shown. Of course, under the premises of appellants' reasoning, the conclusion is unimportant.

II (b) Appellants now claim they do not practice Shope as defined in the patent. The fact of infringement was so clear that Judge Wolverton issued a preliminary injunction which is unusual on an unadjudicated patent. After hearing all the evidence, Judge Bean said in his judgment on this point, there was "no room for controversy."

Pardon the digression, appellants' statements that the lower court was "misled," "led into palpable error," "deceived," did not give "critical attention" or "proper analysis" as disclosed by an "oral" opinion, remind one of the lamentations of a fond mama that "all the army

was out of step except her son." The analytical power of Judge Bean and his conscientious preparation, as well as a long line of unreversed decisions, are too well known to both bench and bar to offer more than trite opportunity for eulogy.

To return, not to speculation but evidence. Appellant Peterson could not in detail describe the process (supra, p. 29); Appellant Ward did not "avoid agitation" (Brief, p. 58) but "I *try* to keep away from agitation" (p. 141). All the erudite testimony of Dr. Strong of the difference in treatment by the parties hereto of the water and cement on the face of the block crashed before the direct question:

> Court: "I suppose, Professor, you mean in plain English that one was rubbed more than the other?"
>
> Ans. "Yes." (p. 167.)

Infringement is, of course, sought to be avoided, but the identity of process is disclosed in two ways: First, take the cement brick, proclaimed as "old in the art," and appellants mix "ex situ" cement and water on a mortar board. They then apply this cement, in solution admittedly, to the face of the brick, *then apply more water.* An illustration was made on the afternoon of May 14, 1924, in both plants, expert Bilyeu, a mechanical engineer, saw the operations in both places, and described the repeated use of the whisk broom to provide water and the comment by Appellant Ward that

the broom had been hanging up and was dry so he had to return to the barrel more *frequently* for water. Otherwise Ward testified he "always made them the same" (p. 143). On this admitted testimony, Dr. Werner commented as follows:

> "They (the appellants) applied what is technically known, or rather in the parlance of the trade, as slurry; this slurry is placed upon the face of the brick by means of a trowel and thereafter a brush was used which had been repeatedly dipped into water. The quantity of water was not stated. If one bears in mind what I have said before in regard to these minute small particles which at the early stage of formation are not jelly like, but can be readily dispersed, as cement slurries can be, and then say that if these defendants use a material quantity of water, not necessarily a large quantity, but material, this slurry will function to give up some of these small particles to now function according to the patentee, in other words, wash out sufficient of the cement, merely suspended cement, to enter the pores, the question to me is simply this: How much water do they use to do this?" (p. 177.)

If Ward puts the whisk broom in water so it will "frizz out and acts more like a sponge" (p. 145) yet it performs a function of Shope's patent, i. e. adds water, the fact it performs another function, i. e., keeps the

brush "frizzed," will not prevent it being an infringement.

> Norton et al v. California Automotive Car Co. (D. C. Cal. 1891), 45 Fed. 637, 638.
>
> Masseth v. Palm (C. C. Penn. 1892), 51 Fed. 824, 826.

On the second phase of infringement, the statement that appellants avoid agitation is not correct, they "try to avoid" it, and even Dr. Strong admitted there must have been some agitation "in traveling back and forth, the movement of the particles one upon another, and must have been some mixing" (p. 167). Witness Bilyeu states that Ward went "back two or three times for more material until a complete surface coat was created" (p. 111). Certainly the repeated application of more cement to the surface and the repeated rubbing to effect a "complete surface coat" and stabbing with a broom, means agitation.

This application of water and mixing of the cement on the surface by broom or trowel is mixing "in situ" as disclosed by the patent in suit. The only difference being, as the Court said: "One was rubbed more than the other."

The difference in *degree* of agitation or in the *materials* used, are not matters which will relieve appellants from infringement.

"And as to the defendants' using a different method from that suggested in the patent for keeping up the mixture of fat and water, that is of no consequence. The keeping up of the mixture is the important thing. That is a necessary part of the process" (p. 731).

Tilghman v. Proctor (1880), 102 U. S. 730.

Another alleged distinction between the Shope agitation by wooden float and the Ward smoothing by metal trowel, attempted to be explained by Ward as a suction in the wood (p. 147) and agreed to as a distinction by their expert, Dr. Strong (p. 167) was refuted by Dr. Werner as not being any distinction (p. 185) and his conclusion verified and the "distinction" exploded by the offer to prove and final stipulation that Shope also used a metal face (p. 212).

In concluding argument, appellants ask the Court to not believe it if they see cement penetrated into the pores of a Shope brick, that such is not penetration but agitation as shown by the difference of the manufactured brick of these litigants. Both kinds of brick are before the court. They are now dry with the cementeous colored sand of the block mingling with the purer cement of the face, and the penetration not showing to the same depth as when fresh and the trial court observed them. Yet from the testimony of those present at the manufacture, penetration is unquestionably there.

It is accentuated by agitation, which accounts for any degree, and only degree, not difference, in process, between the Shope and the Ward bricks.

Appellants endeavor to differentiate their application of a slurry mixed *"ex situ"* from the Shope's mixing *"in situ."* A slurry is a semi-plastic mass which without pressure cannot be forced into the interstices of a green block, but a suspension such as Shope uses when mixing his materials "in situ" will enter the block by itself and continue further with slight agitation. The slurry after a time undergoes a process of gelation. At the time of the application to the block, it may or may not be (depending on the time allowed to stand) in this latter condition, but it is at least a semi-plastic mechanical mixture such as the mud spoken of by opposing expert. The addition of water thereto with agitation produces Shope's identical process of mixing "in situ." Due to the addition of water it permits the finer particles of cement (Dr. Strong says they are not soluble, p. 159) now in suspension to enter the green block without pressure. This is what the defendants did and propose to continue to do if allowed. This process, if not identical, is the equivalent of Shope.

There are two tests of equivalency, either one of which infringe. This infringement falls under the head of "Substantial identity of way of performing that function" described in Shope and practiced by Ward. Walker "Patents" (5th Ed.) Sec. 362, p. 446 and "Reason seems to indicate that one act is the equivalent of

another when it works substantially the same way to accomplish the same result." Walker Patents, Sec. 338; and infringement by Ward is not avoided by reversing the steps of the process by mixing the slurry on a board and then applying water and the slurry. Walker, Sec. 338, p. 422.

"A patent for a process is infringed by him who, without ownership or license, uses substantially the process which the patent claims."

Walker "Patents," Sec. 335, p. 418.

One can not help but feel appellants' visit to the Shope plant, though denied, had a great deal to do with their production of a waterproofed faced cement block.

In conclusion, appreciation is expressed to the Court for its attention to argument on principle and fact, probably apparent. But no effort could be spared by the writer, so far as able, to disclose the validity of this contract between the government and appellee, which has contributed materially to building products in a commercial mass production and formed a basis for appellee's and other's fortunes, against those operating without similar dispensation, but from personal inclination with no more than a paltry number of faced brick at stake. The savage resistance encountered is out of proportion to the apparent ability of appellants or their personal requirements and offers food for reflection.

Patents are not voided for anticipation or want of invention unless such is proven beyond a reasonable doubt. Appellants' burden has not been sustained upon the general evidence, irrespective of invoking rules of commercial success, utility, public acceptance and evidence. Nor can infringement be avoided by appellants by claiming differentiation only in degree. That the conclusion reached in the decision of the District Court of the validity of this patent and its infringement, is correct, is

Respectfully submitted,

ROBERT R. RANKIN,

Attorney for Appellee.

APPENDIX

Defendants' Exhibits	Date of Patent	Number of Patent	Patentee	Abstract Direct	Abstract Cross	Appellant's Brief	Appellee's Brief
Ex. "F"	April 17, 1892	518,239	Edward Goode	178		34, 43	15, 51-52, 53
Ex. "G"	Oct. 16, 1894	527,416	Antone Federici	179	206,207	22	17, 52
Ex. "H"	Jan. 1, 1895	531,842	Wm. J. Haddock....	179	198-206	32, 36, 43	18-21; 52-54
Ex. "J"	May 9, 1899	751,089	Chas. W. Stevens....	178-180	208	51, 52	17, 68, 71-72
Ex. "L"	July 1, 1902	703,644	Edw. Davies	180	208-212	23, 34	21-23; 54-57
Ex. "W"	Feb. 2, 1904	751,089	Fred A. Mallette....	181		22	16, 57
Ex. "V"	May 17, 1910	958,194	Augustus O. Thomas	184		24	15, 16; 58-67

No. 4290.

IN THE

United States Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

Roy Ward and Otto Peterson, co-partners, doing business under the firm name of Ward & Peterson, co-partners,

Appellants,

vs.

Shope Brick Company,

Appellee.

Petition of Shope Brick Company, Appellee, for Rehearing.

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The petition of the Shope Brick Company, appellee in the above entitled suit, appealed from the United States District Court for the District of Oregon, respectfully shows as follows, to-wit:

That there are certain important features involved in the Shope patented process which were not sufficiently clearly presented to this court at the time of the hearing, and there were certain important exhibits

presented and used before the District Court which evidently were not before this court. These were Defendant's Exhibits X and Y, being respectively, one of the Shope bricks and one of the Ward & Peterson bricks, and which particularly demonstrate the impossibility of making a Ward & Peterson brick without using the Shope patented process or method.

These matters were due to some oversight, evidently on the part of both sides, and your petitioner represents to this court that the attorney who represented the Shope Brick Company was a general practitioner, and not a specialist in the law of patents, and he was not, therefore, experienced in presenting and analyzing patents for inventions, and in pointing out to the court the features which differentiate a new invention from the prior art.

The court below had before it all of the exhibits, including the exhibits above referred to, and heard all of the testimony in regard thereto, and unhesitatingly held that "The process used by the defendant was substantially the same as that covered by the patent."

This case is very much like that set forth in King v. Hubbard, 97 Fed. 795; 39 C. C. A. 423, in which it was held:

> "This is an instance, not infrequent in patent litigation, where the infringer has sought to evade the claims of a patent, the substance of which he is appropriating, by deliberately impairing the function of one element, without destroying the substantial identity of structure, operation and result."

If appellee is to get full justice and full protection for the new process or method which he originated and which has gone into extensive use, and under which he has many licensees, and if he is to be put in position to shut out those who would evade the letter of his patent while still using substantially the same thing, and to protect his many licensees under his said patent, this court must look through the disguises, as was done in the case of Crown v. Aluminum, 108 Fed. 845; 48 C. C. A. 72 (citing: Clough v. Mfg. Co., 108 U. S. 166 and 108 U. S. 178, and Consolidated v. Crosby, 113 U. S. 157). In that case the court said:

> "The court will look through the disguises, however ingenious, to see whether the inventive idea of the original patentee has been appropriated, and whether the defendant's device contains the material features of the patent in suit, and will declare infringement even when those features have been supplemented and modified to such an extent that the defendant may be entitled to a patent for the improvement."

The Shope process involves something more than mere plastering over a surface. Plastering is applied to extensive hard surfaces, usually on vertical walls and ceilings, and on surfaces, if of cement, which have set or crystallized, with mortar which is of much heavier consistency. The Shope process, when considered in its real scope, is materially different in several important respects, namely:

The Shope process or method is applied to a brick or block which is green, that is, to a freshly formed

brick of a semi-dry mixture, so that it has a pronounced affinity for water or any liquid mixture, as distinguished from a brick or block which has set, or crystallized, or "cured". Shope was the very first to thus take advantage of this condition in a green brick made of such a mixture.

The action which takes place in connection with the Shope process, that is, when a liquid or soft mixture is applied to the surface of a brick so formed of a semi-dry mixture, is capillary attraction, or absorption, and not "by the natural force of gravity alone", as stated in the opinion, and this attraction is what carries the liquid and the cement into the pores of the green block or brick. The attraction is similar to the action of a sponge, or to that which takes place in the wick of an oil lamp.

Now to mix the water and powdered cement or other ingredients on a separate surface, close at hand, and then, while in its soft moist state, apply it to the surface of a green brick or block, and then agitate it to stimulate the penetration by capillary attraction and absorption, and thus get the same action and the same result in a more expensive way, is certainly the clear equivalent of mixing the water and powdered cement or other ingredients on the surface into which it is to penetrate. It is the absorption of the mixture into the surface of a green, or freshly formed brick in semi-dry condition, that constitutes the invention, coupled with sufficient agitation to stimulate or accelerate said absorption.

There was no evidence showing that a freshly formed brick, of semi-dry mixture. as set forth in the patent in suit, was ever before made waterproof by applying to its face a soft cement mixture and agitating the same sufficiently to accelerate the absorption or capillary attraction which carries the cement mixture into the pores of this green brick. *The pronounced affinity for moisture in a green brick* so made is the secret of the invention, and this was not sufficiently made clear and demonstrated to this court, although it was so demonstrated to the court below.

The Exhibits X and Y show the impossibility of making either of said exhibits without using the Shope patented process. These exhibits are what are known as "Oriental bricks", and constitute possibly fifty per cent of the output. They have various tints or colors in different spots or areas on the brick face. The colors are mixed cement and color in powdered form and are sprinkled on and stippled with a wet brush on the face of the brick. If they were troweled, or rubbed, it is evident that the colors would all be run together and the strongest color would determine the final tint, which would be uniform. This is clear. Therefore, the patented process is infringed in the very letter, as well as in the real spirit of the invention, when the dry coloring ingredients are thus sprinkled on the surface and stippled or agitated by any other movement than troweling or rubbing over the surface.

Appellee has developed his industry to a large extent and it is submitted that there is evidence in the record to this effect. [Record, pp. 59, 60.] "The extent of

my licensees since the issue of this patent, some four or five hundred thousand dollars." Doing business in twenty odd states of the Union and in Canada. The product of the various plants in the United States turning out the Shope brick is "from two to three hundred thousand face brick per day."

It is clear that the process or method as set forth in the patent, is absolutely new when properly understood. The patent established a *prima facie* case as to its novelty and usefulness. A green brick in the process of formation and while green, had never before been made waterproof on its face by the described process or method.

His Honor Judge Bean, in the District Court, before whom the entire prior art was displayed and discussed, held that the patent was valid and infringed. The patent does not exclude pressure and count upon gravity to do the work, as stated in the opinion of the court. The process simply requires sufficient agitation, whether by rubbing or stippling, to stimulate and accelerate the absorption action, and this is exactly what Ward & Peterson do. Absolutely the only difference between the two methods is that Ward & Peterson mix the water and powdered cement together first, and then while in a soft moist condition, *capable of an absorption action,* they place it on the semi-dry brick, and agitate it by rubbing it and also by stippling it, and they do it ON A GREEN BRICK, the thing which had never been done until Shope did it. Therefore, when they make "Oriental brick" as per Exhibit Y, they do

the mixing and stippling of the colored cement on the surface of the brick exactly as specified in the Shope patent.

We have set forth sufficient reasons, we believe, to convince this court that there should be a short rehearing, in order that appellee's case should be presented by one experienced in presenting patent matters, and in pointing out to the court the various features of differentiation between the patented process and the prior art. This we believe is due to the Shope Brick Company, and to the licensees operating under said patent, for to limit the patent and thus point out how others can avoid the patent while taking advantage of the real heart thereof, is a miscarriage of justice.

Very respectfully submitted,

THE SHOPE BRICK COMPANY,
By WILLIAM R. LITZENBERG,
Attorney.
506 Security Bldg., Los Angeles.

February 2, 1925.

Counsel for plaintiff and appellee hereby certifies that in his judgment the foregoing petition is well founded, and it is not interposed for delay.

WILLIAM R. LITZENBERG.

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